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2960 No. 15022

United States
Court of Appeals
for the Ninth Circuit

J. P. TONKOFF, individually and as trustee,
Appellant,
vs.

CLAY BARR and BETTY BARR, husband and
wife, Appellees.

Transcript of Record

In Two Volumes
VOLUME I.
(Pages 1 to 272, inclusive)

Appeal from the United States District Court for the
District of Oregon.

FILED

APR 30 1956

PAUL P. O'BRIEN, CLERK

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Portland 5, Oregon,

For Appellees.

In the United States District Court for the
District of Oregon

Civil No. 7378

J. P. TONKOFF, Individually, and J. P. Tonkoff,
as Trustee of E. J. Welch and Viola Welch,
husband and wife, Roland P. Charpentier and
Effie Charpentier, husband and wife, and John
W. Cramer, Plaintiff,

vs.

CLAY BARR and BETTY BARR, husband and
wife, and KERR-GIFFORD CO., a corpora-
tion, Defendants.

COMPLAINT

Plaintiff complains of the defendants and alleges:

1. That the plaintiff, J. P. Tonkoff, as well as the beneficiaries E. J. Welch and Viola Welch, are residents of the State of Washington. That the beneficiaries Roland P. Charpentier and Effie Charpentier and John W. Cramer are all residents of the State of Idaho; that the defendants Clay Barr and Betty Barr are residents of the State of Oregon and Kerr-Gifford Co., a corporation, is a corporation incorporated either in the State of Oregon or some state other than the State of Washington. That by reason of the foregoing residences there is a diversity of citizenship between the plaintiffs and the beneficiaries and the defendants, Clay Barr and Betty Barr and Kerr-Gifford Co., a corpora-

tion; that the amount in controversy exceeds the sum of \$3,000.00.

2. That at all times mentioned herein plaintiff, J. P. Tonkoff, was and now is one of the named trustees in the certain Declaration of Trust executed on the 10th day of June, 1953 at Spokane, Washington, which is marked Exhibit "A" and hereto attached and by reference made a part of this paragraph as though fully set forth. That Horton Herman, one of the trustees named in said Declaration of Trust has resigned as trustee, a copy of said resignation marked Exhibit "B" is hereto attached and by reference made a part of this paragraph as though fully set forth.

3. That the plaintiff, J. P. Tonkoff, has a personal interest separate and apart from his capacity as Trustee in the crop and proceeds named in said Declaration of Trust, as appears in said instrument hereto attached and marked Exhibit "A".

4. That at the time of the execution of the Declaration of Trust, Exhibit "A", the defendants, Clay Barr and Betty Barr, were operating the property located in Siskiyou County, California, known as the Meiss ranch, under a lease dated the 7th day of May, 1953, which lease named Frank Hofues and Dorothy Hofues, husband and wife, and Albert G. Kirschmer and Virginia Kirschmer, husband and wife, as lessors and defendants, Clay Barr and Betty Barr, as lessees, and at which time the crops growing upon said property were in a good condition.

5. At the time of said Declaration of Trust, Ex-

hibit "A" the defendants, Clay Barr and Betty Barr, warranted that there were approximately 2,800 acres of crops growing, when in truth and in fact said warranty was false and untrue, and that there were crops planted and growing in the following amounts:

Oats	1,086 acres
Wheat	132 acres
Barley	1,200 acres
Rye	250 acres

Total2,668 acres

6. That the defendants, Clay Barr and Betty Barr, husband and wife, refused, failed and neglected to perform in accordance with the terms and conditions of their assignment, which provides that said defendants would farm said property in a good and farmerlike fashion, in that:

(a) That said defendants failed, refused and neglected to properly or at all spray the growing crops during the growing season in order to destroy the noxious weeds which had infested the land and crops, when in the exercise of ordinary care and the custom in the locality required said defendants to spray said crops with a spray to destroy the noxious weeds, so that as a consequence thereof crops growing on 446 acres could not and were not harvested by said defendants.

(b) That the said defendants failed, refused and neglected to irrigate said crops in a good farmerlike manner so that as a consequence thereof a large

quantity of the crops were either totally destroyed or unable to ripen and develop, so they could be harvested.

(c) That the said defendants during the first part of August plowed under 120 acres of oats, without the consent, knowledge and authority of the Trustees or Beneficiaries named in Exhibit "A".

(d) That the said defendants failed, refused and neglected to harvest the crops in a good and farmer-like fashion, in that the harvesting was performed in such a manner in operating the harvesting machines at so fast a speed and in such a manner that approximately ten per cent of the grain crops were either not harvested or wasted.

(e) That the said crops were conveyed from the Meiss ranch to Medoel, California in trucks which were inadequate and improper for the conveyance of said crops so approximately five per cent of the crops escaped over the tops and sides and bottoms of said trucks.

7. That had the defendants, Clay Barr and Betty Barr, husband and wife, cultivated, farmed and harvested the said property and crops named in Exhibit "A" in a good and farmerlike fashion, they would have produced and harvested:

Barley: 3,500 pounds per acre; value per hundred weight, \$3.00.

Rye: 1,200 pounds per acre; value per hundred weight, \$1.90.

Wheat: 1,500 pounds per acre; value per hundred weight, \$3.10.

Oats: 4,000 pounds per acre; value per hundred weight, \$2.30.

Which crops would have been valued and would have brought on the market in excess of \$250,000.00, \$125,000.00 of which would have been available to pay plaintiff and his beneficiaries the sum of \$72,500.00.

8. That the defendant, Kerr-Gifford Co., is a corporation doing business in California and Oregon and is engaged in the business of buying and selling of grains of various kinds.

9. That the defendants, Clay Barr and Betty Barr, husband and wife, harvested and sold all of the crops described in Exhibit "A" to the defendant Kerr-Gifford Co., a corporation, for the approximate sum of \$70,000.00 (one-half of said sum being payable to parties other than plaintiff and the beneficiaries). That the monetary proceeds from said crops are being retained by the defendant, Kerr-Gifford Co. and that the said defendant, Kerr-Gifford Co., refuses to give up any portion of said proceeds notwithstanding the fact that said Kerr-Gifford Company was advised and knew that the plaintiff, J. P. Tonkoff was and now is the owner of said crop as an individual and as trustee in accordance with the terms and conditions and provisions of Exhibit "A" attached hereto and as amended by Exhibit "B" attached hereto.

Wherefore, Plaintiff prays for:

1. Judgment against the defendant, Kerr-Gifford

Co., a corporation, in the sum of \$35,000.00 or for 50% of the proceeds from said crops, whichever is the greater sum, with interest at the rate of six per cent per annum from the 15th day of November, 1953, until paid.

2. For the sum of \$72,500.00 from the defendants, Clay Barr and Betty Barr, with interest at the rate of six per cent per annum from the 15th day of November, 1953, less such sum as may be paid to plaintiff individually and in his capacity as Trustee by Kerr-Gifford Co., a corporation, by virtue of this proceeding.

3. For plaintiff's costs and disbursements herein incurred.

/s/ VIRGIL COLOMBO,
Of Attorneys for Plaintiffs

EXHIBIT "A"

DECLARATION OF TRUST

Whereas, the undersigned, J. P. Tonkoff and Horton Herman, are the assignees named in that certain written Assignment, dated June 10, 1953, executed by Clay Barr and Betty Barr, his wife, as assignors, which assignment is in words and figures as follows, to-wit:

"Assignment

This Agreement Made and entered into this 10th day of June, 1953, by and between Clay Barr and Betty Barr, his wife, hereinafter called Assignors,

and J. P. Tonkoff and Horton Herman, hereinafter called Assignees.

Whereas, the above named Assignees are the attorneys respectively for E. J. Welch and Viola A. Welch, his wife, and Clay Barr and Betty Barr, his wife; and said parties being involved in a civil action for damages, and;

Whereas, Roland P. Charpentier and Effie G. Charpentier, his wife, being represented by John W. Cramer of Lewiston, Idaho, are judgment creditors of E. J. Welch and wife, and;

Now, Therefore, it is mutually agreed as follows:

1. The Assignors do hereby assign to the assignees for the benefit of the Assignees and Roland P. Charpentier and his wife and E. J. Welch and Viola Welch, his wife, and John W. Cramer all of their right, title and interest in and to the growing crops to be harvested in 1953 on that certain property located in Siskiyou County, California, and known as the Miess Ranch, which ranch is in the possession of the Assignors as Lessees under that certain lease dated May 7, 1953, by and between Frank Hofues and Dorothy Hofues, his wife, and Albert G. Kirschmer and Virginia Kirschmer, his wife, as Lessors, subject, however, to the following provisions:

- a. The Assignors agree to harvest said crops without interference from the Assignees and/or the persons for whom they are taking this assignment,

and shall retain out of the Lessees' interest in said crop the sum of Fifteen Thousand Dollars (\$15,000.00) to over their cost of harvesting.

b. The Assignors herein agree upon the harvest of said assigned crop to deposit the same at their expense in a warehouse or warehouses and to have warehouse receipts therefor issued in the names of the Assignees. It is agreed that at the earliest practical date, not in any event to be later than November 15, 1953, said crop to be sold up to the extent of Seventy-two Thousand Five Hundred Dollars (\$72,500.00) net to the Assignees; and the Assignees shall upon the receipt of said sum endorse and deliver over to the Assignors all warehouse receipts, if any, representing any of said crops not so sold.

c. The Assignors agree to notify the Assignees in writing of the commencement of harvesting at least ten (10) days before said harvest, said notice to be addressed to J. P. Tonkoff, 616 Miller Building, Yakima, Washington, and Horton Herman, 215 Paulsen Building, Spokane, Washington.

The execution and delivery of this assignment by the Assignors to the Assignees is made and accepted in full settlement of all claims, demands, actions and causes of action of any and every kind and nature in any way arising out of or pertaining to the subject matter of that certain law suit No. 135666 now pending in the Superior Court in and for the County of Spokane, State of Washington, wherein the said Welchs are named as plaintiffs and the Assignors herein and Sterling Higgins are named

as defendants; and all claims of every kind and nature against the said Clay Barr and wife in any manner arising out of the sale, lease or operation of that certain property known as the Pair-A-Dice Club in the City of Lewiston, Idaho.

The Assignors, Clay Barr and Betty Barr, his wife, warrant that they are the owners of a fifty per cent (50%) interest in the crop growing on the above described property; and warrant that there is planted to crop on the above described farm property approximately Twenty-eight Hundred (2800) acres; and that the Assignors' interest in said crop is free and clear from any encumbrance.

The Assignors herein agree to farm said lands in a good and farmer-like fashion and in accordance with the terms of the aforementioned lease, it being understood and agreed that the Assignors are not guaranteeing any particular yield, and shall not be liable for crop failure due to any cause beyond the control of the Assignors.

In Witness Whereof, the parties to the within instrument have executed the same the day and year first above written.

CLAY BARR
BETTY BARR

Assignors

J. P. TONKOFF
HORTON HERMAN

Assignees

and shall retain out of the Lessees' interest in said crop the sum of Fifteen Thousand Dollars (\$15,000.00) to over their cost of harvesting.

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as defendants; and all claims of every kind and nature against the said Clay Barr and wife in any manner arising out of the sale, lease or operation of that certain property known as the Pair-A-Dice Club in the City of Lewiston, Idaho.

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In Witness Whereof, the parties to the within instrument have executed the same the day and year first above written.

CLAY BARR
BETTY BARR

Assignors

J. P. TONKOFF
HORTON HERMAN

Assignees

State of Washington,
County of Spokane—ss.

I, the undersigned, a Notary Public in and for the above-named county and state, do hereby certify that on this 10th day of June, 1953, personally appeared before me Clay Barr and Betty Barr, his wife, to me known to be the individuals described in and who executed the within instrument, and acknowledged that they signed and sealed the same as their free and voluntary act and deed, for the uses and purposes therein mentioned.

Given under my hand and official seal the day and year last above written.

[Seal]

MABEL JACKSON,
Notary Public in and for the State of Washington,
residing at Spokane.

Approved and Consented to by the following: E. J. Welch, Viola Welch, Roland P. Charpentier, Effie J. Charpentier, John W. Cramer.

And Whereas, it is the desire of the assignees to set forth in writing the terms and conditions under which they accepted and hold said assignment;

Now, Therefore, the following,

Declaration

I, the undersigned, J. P. Tonkoff and Horton Herman do hereby declare that they hold said assignment as Trustees for the use and benefit of themselves and for the use and benefit of the following named persons, to-wit: E. J. Welch and Viola A. Welch, his wife; Roland P. Charpentier

and Effie G. Charpentier, his wife, and John W. Cramer.

That the net proceeds of the sale of the crop referred to in said assignment are to be divided and paid as follows:

To J. P. Tonkoff	\$15,000.00
To Horton Herman	10,000.00
To E. J. Welch and Viola A. Welch, his wife	27,500.00
To Roland P. Charpentier and Effie G. Charpentier, his wife	15,000.00
John W. Cramer	5,000.00
	<hr/>
	\$72,500.00

It is understood and agreed that in the event the net proceeds of the sale of said crop referred to in the assignment that are received by the assignees does not equal \$72,500.00, then such lesser amount as is received by said assignees, who are the Trustees in this Declaration of Trust, shall be divided and paid to the above named parties on a pro rata basis in proportion that the amount each would receive if the net proceeds of sale equal \$72,500.00 bears to the amount of the actual net proceeds received.

It is specifically understood and agreed that the obligation of the undersigned, J. P. Tonkoff and Horton Herman, is confined solely to disbursement of funds in the manner aforesaid actually received by them pursuant to the terms of the aforementioned assignment.

Any assignment or other transfer by any of the beneficiaries named in this Declaration of Trust shall not be binding upon the undersigned Trustees, J. P. Tonkoff and Horton Herman, unless such assignment or transfer is in writing and an executed copy thereof filed with each of the named Trustees herein.

It is understood that each of the beneficiaries in this Declaration of Trust shall place his and her signature hereon, which shall ratify and confirm this document; shall constitute their approval hereof and their agreement to the division of funds in the manner hereinabove specifically set forth and, by so signing this document, the said E. J. Welch and Viola A. Welch, his wife, and Roland P. Charpentier and Effie G. Charpentier, his wife, and John W. Cramer do thereby reiterate and confirm the fact that, irrespective of the amount or amounts received by each of them pursuant to the terms of said assignment, the execution of such assignment hereinabove quoted and their approval and consent thereto, constitutes a full settlement of all claims, demands, actions and causes of action of any and every kind and nature that any of them had, have or may have against Clay Barr and Betty Barr, his wife, in any manner arising out of the purchase, sale, lease or operation of that certain property known as the Pair-A-Dice Club in the City of Lewiston, Idaho, or in any manner arising out of or pertaining to the subject matter of that certain lawsuit, No. 135666, in the Superior Court of the State of Washington, in and for the County of Spokane, wherein the said E. J. Welch is named as

plaintiff, and Clay Barr and Sterling Higgins are named as defendants.

Dated this 10th day of June, 1953.

/s/ J. P. TONKOFF

/s/ HORTON HERMAN

Trustees

The undersigned do hereby approve of and consent to and join in the foregoing Declaration of Trust. Signed: J. P. Tonkoff, Horton Herman, E. J. Welch, Viola Welch, Roland P. Charpentier, Effie G. Charpentier, John W. Cramer.

EXHIBIT "B"

Resignation

In accordance with the demand of E. J. Welch, Viola A. Welch, Roland P. Charpentier, Effie G. Charpentier, John W. Cramer and J. P. Tonkoff, Beneficiaries under "Declaration of Trust" dated June 10, 1953 and J. P. Tonkoff, Trustee under said agreement, the undersigned, Horton Herman, does hereby resign from such trusteeship.

Dated this 26th day of January, 1954.

.....

Horton Herman

[Endorsed]: Filed February 8, 1954.

[Title of District Court and Cause.]

MOTION TO DISMISS

Come now defendants Clay Barr and Betty Barr and move the court for an order dismissing the above entitled action for the following reasons:

(1) That the complaint fails to state a claim against these defendants upon which relief can be granted, in that:

(a) The complaint does not allege that the assignment quoted in the declaration of trust dated June 10, 1953, was in fact executed.

(b) The complaint does not show any breach of duty owing by these defendants to plaintiffs; and said assignment, if deemed to be sufficiently alleged, shows on its face that these defendants did not guarantee any particular yield.

(c) As to the sum of \$15,000 for cost of harvesting, referred to in said assignment (if said assignment be deemed sufficiently alleged), the complaint alleges no basis for claiming that said amount should be paid to plaintiffs, rather than to defendants Barr or their successors in interest, as provided in said assignment.

(d) The complaint does not show that plaintiffs have authority to bring this action on behalf of all beneficiaries of said trust.

(e) The complaint does not show any standing of plaintiff Tonkoff, as trustee, to maintain this action, in that said declaration of trust shows on its face that any obligation of the trustees is con-

ined solely to disbursement of funds actually received, and neither said assignment nor said trust instrument confers on the trustees or either of them any right or power to sue on behalf of the beneficiaries.

(2) That the complaint fails to join indispensable parties, in that:

(a) The complaint joins as plaintiffs some only of the beneficiaries under the declaration of trust dated June 10, 1953, and it does not join all of such beneficiaries but omits Horton Herman, or his successor in interest, who is a named beneficiary in said declaration of trust.

(b) In the alternative, if all of the beneficiaries are not indispensable parties, then both trustees would be indispensable parties, as joint obligees, and the complaint does not show that the purported resignation of Horton Herman as trustee was valid and effective, in that such resignation would be valid and effective only with the consent of all beneficiaries, and the complaint does not show that such consent was obtained from all beneficiaries.

(c) Even if Horton Herman's purported resignation as trustee is valid and effective, he is still one of the assignees named in said assignment and is therefore an indispensable party.

/s/ RANDALL B. KESTER,

Attorney for Defendants Clay Barr
and Betty Barr

Of Counsel:

Maguire, Shields, Morrison & Bailey.

State of Oregon,
County of Multnomah—ss.

This is to certify that the foregoing Motion is made in good faith, not for the purpose of delay, and that in my opinion the same is well founded in law.

/s/ RANDALL B. KESTER,
Attorney for Defendants Clay Barr
and Betty Barr

Acknowledgment of Service attached.

[Endorsed]: Filed February 19, 1954.

[Title of District Court and Cause.]

MINUTE ORDER OF MARCH 15, 1954

Plaintiffs appearing by Mr. Virgil Colombo, of counsel, and the defendants Clay Barr and Betty Barr by Mr. Randall B. Kester, of counsel. Whereupon, this cause comes on to be heard upon the motion of the defendants Clay Barr and Betty Barr for an order dismissing this cause, and the Court having heard the arguments of counsel,

It Is Ordered that said motion be, and is hereby, denied.

[Title of District Court and Cause.]

AMENDED ANSWER OF DEFENDANTS
BARR

Come now defendants Clay Barr and Betty Barr, and for amended answer to plaintiff's complaint admit, deny and allege as follows, to wit:

First Defense

The complaint herein fails to state a claim against these defendants upon which relief can be granted.

Second Defense

These defendants:

(1) Admit that the residences of the parties are as stated in paragraph 1 of the complaint;

(2) Admit that plaintiff J. P. Tonkoff was and is one of the named trustees and also a beneficiary in the declaration of trust attached to the complaint;

(3) Admit that these defendants for a time operated the Meiss ranch in Siskiyou County, California, under a lease from Frank and Dorothy Hofues and Albert G. and Virginia Kirschmer;

(4) Admit paragraph 8 of the complaint, and that the crops referred to in said declaration of trust were sold to Kerr-Gifford Company, which still holds the proceeds thereof; and

(5) Deny all the remainder of said complaint and each and every part thereof.

Third Defense

1. On or about July 9, 1953, Horton Herman, named as a beneficiary in said declaration of trust, for value received, sold, assigned and transferred to Harvey S. Barr all of his right, title and interest as beneficiary thereunder, and all parties were duly notified of said assignment.

2. On or about October 12, 1953, these defendants, for value received, sold, assigned and transferred to A. G. Kirschmer the sum of \$15,000 which they were to receive from Kerr-Gifford Company from the proceeds of said crop under said declaration of trust, and all parties were duly notified of said assignment.

3. Said Harvey S. Barr, assignee of said Horton Herman, did not consent to the purported resignation of said Horton Herman as trustee under said declaration of trust, but refused to accept such resignation by reason whereof said purported resignation was and is invalid and of no effect.

4. The complaint herein fails to join indispensable parties, in that:

(a) It fails to join said Harvey S. Barr, assignee of the beneficial interest of Horton Herman;

(b) It fails to join Horton Herman who is still a co-trustee under said declaration of trust;

(c) It fails to join A. G. Kirschmer, assignee of defendant Clay Barr.

And for answer to the counterclaim of defendant, Kerr Gifford & Co. Inc. for interpleader, these defendants admit, deny and allege as follows, to wit:

First Defense

Said counterclaim fails to state a claim upon which interpleader can be granted.

Second Defense

These defendants admit paragraphs 1, 2, 3, 4 and 5 thereof, but deny paragraph 6 thereof, and particularly deny that defendant Kerr Gifford & Co. Inc. is entitled to an order of interpleader or to its costs or attorney fees from the proceeds of said grain crop now held by it.

Third Defense

Any demand by plaintiff, J. P. Tonkoff, individually or as trustee, for the sum of \$15,000 reserved to these defendants by said assignment of June 10, 1953, and thereafter assigned to said A. G. Kirschmer, is wholly sham and frivolous and without right or color of right, and gives no justification to defendant Kerr Gifford & Co. Inc. for refusing to pay said amount to said A. G. Kirschmer.

Fourth Defense

1. Said A. G. Kirschmer is a citizen and resident of the State of Texas; said Harvey S. Barr and Horton Herman are citizens and residents of the State of Washington; and the residences of the other parties are as stated in paragraph 1 of the complaint.

2. This court has no jurisdiction to grant inter-

pleader in this proceeding, for the reason that none of the claimants to the proceeds of said crop held by Kerr Gifford & Co. Inc. is a citizen or resident of the State of Oregon.

Wherefore, these defendants pray:

(1) That this action be dismissed;

(2) If the action is not dismissed, that plaintiff take nothing thereby; and

(3) If the action is not dismissed, that judgment be entered against defendant Kerr Gifford & Co. Inc. for the sum of \$15,000, with interest at 6 per cent from November 15, 1953, in favor of A. G. Kirschmer, if he is made a defendant, or if he is not made a defendant then in favor of defendants Barr in trust for said A. G. Kirschmer.

/s/ RANDALL B. KESTER,

Of Attorneys for Defendants Clay
Barr and Betty Barr

Of Counsel:

Maguire, Shields, Morrison & Bailey,
Attorneys for Defendants Barr

Acknowledgment of Service attached.

[Endorsed]: Filed May 17, 1954.

[Title of District Court and Cause.]

ANSWER AND COUNTERCLAIM FOR INTERPLEADER OF DEFENDANT KERR GIFFORD & CO. INC.

Defendant Kerr Gifford & Co. Inc. for answer to plaintiff's complaint, admits and denies as follows:

I.

Admits the allegations of Paragraphs I through IV inclusive of plaintiff's complaint.

II.

Alleges it has not sufficient information or knowledge to form a belief as to the truth or falsity of the allegations of Paragraphs V, VI and VII of plaintiff's complaint and therefore denies the same and the whole thereof.

III.

Denies the allegations of Paragraphs VIII and IX, except that defendant admits it is a corporation organized under the laws of the State of Oregon and engaged in the business of buying and selling of grains and that it purchased from the defendants Clay Barr and Betty Barr a crop produced upon the premises mentioned in plaintiff's complaint and that said defendants, their successors and assigns, were entitled to one half of the proceeds of said crop.

And as a Counterclaim for Interpleader, Defendant Kerr Gifford & Co. Inc. alleges as follows:

I.

Kerr Gifford & Co. Inc. is a corporation, organized and existing under the laws of the State of Oregon.

II.

Plaintiff J. P. Tonkoff and beneficiaries E. J. Welch and Viola Welch are residents and citizens of the State of Washington; beneficiaries Roland P. Charpentier and Effie Charpentier and John W. Cramer are residents and citizens of the State of Idaho; defendants Clay Barr and Betty Barr are residents and citizens of the State of Oregon; and Albert G. Kirschmer is a resident and citizen of Texas.

III.

During the crop year 1953 defendants Clay Barr and Betty Barr sold to defendant Kerr Gifford & Co. Inc. certain grains produced by them on lands leased from Albert G. Kirschmer and Virginia Kirschmer, husband and wife, and Frank Hofues and Dorothy Hofues, husband and wife, as lessors under a lease which provided that the lessees were entitled to one half of the crop; that the grains were purchased for the full price of \$88,746.53 and the defendants Clay Barr and Betty Barr, as lessees, or those claiming by, through or under them were entitled to one-half of the proceeds, namely, \$44,373.28, which sum Kerr Gifford & Co., Inc. presently holds for the persons entitled to same.

IV.

Defendant is informed and therefore alleges that defendants Clay Barr and Betty Barr have assigned to Albert G. Kirschmer of Amarillo, Texas, all of their right, title and interest in and to the sum of \$15,000.00 of said proceeds, being the cost of harvesting, as alleged in plaintiff's complaint.

V.

Plaintiff J. P. Tonkoff has made demand upon Kerr Gifford & Co. Inc. for all of the lessees' share of the proceeds of the crop and the defendants Clay Barr and Betty Barr, on behalf of their assignee, Albert G. Kirschmer, have made demand upon Kerr Gifford & Co. Inc. for \$15,000.00 of the proceeds of said crop.

VI.

Defendant cannot safely determine which of said claimants is entitled to said proceeds, or a portion thereof, and consequently is or may be exposed to double or multiple liability.

Wherefore, defendant Kerr Gifford & Co. Inc. demands

(1) That the Court order Albert G. Kirschmer of Amarillo, Texas, be made a party defendant and required to respond to the complaint and to this counterclaim;

(2) That the Court order plaintiff, the defendants Clay Barr and Betty Barr and said Albert G. Kirschmer to interplead their respective demands and claims;

(3) That the Court establish which of said parties are entitled to said sum of \$44,373.28, or portion thereof;

(4) That the Court order defendant Kerr Gifford & Co. Inc. be discharged from any and all liability in the premises upon the deposit by it into the Registry of the Court of the sum of \$44,373.28; and

(5) That the Court award to defendant Kerr Gifford & Co. Inc. its costs and attorney fees herein.

KOERNER, YOUNG, McCOLLOCH
& DEZENDORF,

/s/ HARRY DeFRANCQ,

Attorneys for Defendant Kerr

Acknowledgment of Service attached.

[Endorsed]: Filed March 1, 1954.

[Title of District Court and Cause.]

ORDER BRINGING IN ADDITIONAL DE-
FENDANT AND DIRECTING ISSUANCE
OF PROCESS

Based upon the motion of the defendant Kerr Gifford & Co. Inc. for an order that A. G. Kirschmer be brought in as a defendant and that process duly issue to and be served upon him, and the Court having heard argument of counsel and it appearing that good cause therefor exists;

It Is Hereby Ordered that A. G. Kirschmer be

and hereby is brought in as an additional defendant and that process shall duly issue to and be served upon A. G. Kirschmer and that the return date upon the process issued to A. G. Kirschmer to be served in the State of Texas shall be 20 days from the date of service.

Done in open Court at Portland, Oregon, this 7th day of June, 1954.

/s/ CLAUDE McCOLLOCH,
Judge

[Endorsed]: Filed June 17, 1954.

Title of District Court and Cause.]

MOTION

Comes now A. G. Kirschmer, named as an additional defendant herein, and moves the court for an order dismissing the so-called counterclaim for interpleader, filed herein by defendant Kerr Gifford & Co. Inc., on the following grounds:

(1) The court has no jurisdiction over the subject matter, for the reason that no claimant to the fund is a citizen or resident of the State of Oregon, as the defendants Barr make no claim to the fund on their own behalf.

(2) The court has no jurisdiction over this defendant, for the reason that this defendant is a citizen and resident of the State of Texas, and he

has not been served with summons or other process within the State of Oregon.

(3) The venue of this cause is improper for the reason that no claimant to the fund is a resident of the State of Oregon, as the defendants Barr make no claim to the fund on their own behalf.

(4) The purported process herein, as to this defendant, was and is insufficient, for the reason that this court has no power to issue its process to be served outside the State of Oregon, there being no jurisdiction or venue for interpleader.

(5) The purported service of process upon this defendant was and is insufficient, in that the same was not served within the State and District of Oregon, but was attempted to be served upon the wife of this defendant, in the State of Texas.

(6) The alleged counterclaim for interpleader does not state a claim on which relief can be granted, for the reason that it appears on the face thereof that this court has no jurisdiction of the subject matter and that venue is improper.

/s/ WILLIAM E. DOUGHERTY,
Attorney for Defendant A. G.
Kirschmer

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 13, 1954.

[Title of District Court and Cause.]

RESIGNATION

In accordance with the demand of E. J. Welch, Viola A. Welch, Roland P. Charpentier, Effie G. Charpentier, John W. Cramer and J. P. Tonkoff, Beneficiaries under "Declaration of Trust" dated June 10, 1953, and J. P. Tonkoff, Trustee under said agreement, the undersigned, Horton Herman, does hereby resign from such trusteeship.

Dated this 26th day of January, 1954.

/s/ HORTON HERMAN

[Endorsed]: Filed October 18, 1954.

[Title of District Court and Cause.]

REPLY TO ANSWER OF DEFENDANTS BARR

Plaintiff by way of reply to the defenses contained in the answer of defendants Barr, denies each and every allegation therein contained, except as the same is not inconsistent with plaintiff's complaint.

1. That prior to June of 1953 E. J. Welch, through plaintiff J. P. Tonkoff, instituted an action in the Superior Court of the State of Washington in and for Spokane County against Clay Barr and Sterling Higgins, charging said defendants with a

fraudulent conspiracy and praying for damages in excess of \$80,000.00.

2. That at the said time Horton Herman was a practicing attorney in Spokane, Washington and appeared in the above referred to action on behalf of the defendant Clay Barr.

3. That during the course of said trial and before the same was consummated and upon the proposal of Horton Herman on behalf of the defendant Clay Barr, a settlement was proposed whereby it was agreed that Welch's claim would be settled and compromised for the sum of \$62,500.00, payable in the following amounts: J. P. Tonkoff, \$15,000.00; E. J. Welch and Viola Welch, his wife, \$27,500.00; Roland Charpentier and Effie Charpentier, his wife, \$15,000.00; John Cramer, \$5,000.00; providing the said sum was to be obtained from the proceeds of a 2800 acre grain crop in which the defendant Clay Barr had a half-interest and situate in Siskiyou County, California on a certain property known as the Meis Ranch.

4. That during said negotiations, the said Horton Herman insisted that an additional sum of \$10,000.00 be paid to him as attorneys' fees and that said sum should be obtained from the grain crop. Consequently, the "Declaration of Trust" which was executed by the parties, a copy of which is attached to plaintiff's complaint, was executed and delivered.

5. Thereafter, on or about the 9th day of July, 1953, this plaintiff believes and therefore alleges, that Horton Herman conveyed his interest to Har-

vey Barr, the father of Clay Barr, for the sum of \$7,500.00.

6. That on or about the 2nd day of July, 1953, this plaintiff and E. J. Welch, having been informed that the grain crop was improperly farmed, induced the said Clay Barr to visit said ranch in the company of plaintiff J. P. Tonkoff and E. J. Welch, at which time it was discovered that said crop was grievously neglected and that the same had not been properly irrigated or cultivated, and at which time the said Clay Barr promised and agreed to immediately start farming said crop in accordance with the "Declaration of Trust" but refused and failed to comply with said promise and agreement.

7. Thereafter, on or about the 12th day of October, 1953, this plaintiff believes and therefore alleges, that Clay Barr and Betty Barr, his wife, assigned and transferred to A. G. Kirschmer \$15,000.00 provided for in the "Declaration of Trust" to be paid to Clay Barr.

8. That thereafter, during the months of October and November, 1953, defendants Clay Barr and Betty Barr, his wife, harvested the crops growing on the Meis ranch and refused and failed to deposit said crops in accordance with the terms of the "Declaration of Trust" which provides "that the assignors (referring to Clay and Betty Barr) herein agree upon the harvest of said assigned crop to deposit the same at their expense in a warehouse or warehouses and to have warehouse receipts therefor issued in the names of the assignees. It is agreed that at the earliest practical date, not in any event

to be later than November 15, 1953, said crop to be sold up to the extent of \$72,500.00 net to the assignees; and that the assignees shall upon the receipt of said sum endorse and deliver over to the assignors all warehouse receipts, if any, representing any of said crops not so sold," but instead sold and delivered all of said crops belonging to the said defendants Clay and Betty Barr, his wife, to Kerr-Gifford Co.

9. That thereafter, subsequent to the 15th day of November, 1953, this plaintiff made demands upon Kerr-Gifford Co. for the proceeds of said crops, but was refused payment, and thereafter this plaintiff requested Horton Herman to join this plaintiff as party plaintiff in the institution of an action against Clay Barr and Betty Barr and against Kerr-Gifford Co. to obtain the proceeds which rightfully belonged to this plaintiff and the beneficiaries in the "Declaration of Trust" but that the said Horton Herman refused to join said plaintiff and therefore this plaintiff brought an action designating Horton Herman as a party defendant, and which action was brought in the Federal District Court at Portland, Oregon.

10. After said action was instituted, the said Horton Herman filed motions and advised the court that there was no merit to plaintiff's claim and consequently the said action was dismissed. Thereafter, prior to the 26th day of January, 1954, demand by this plaintiff and the beneficiaries was made upon Horton Herman for his resignation as trustee under the "Declaration of Trust" or action would be instituted to remove him as such. Pursuant to said

demands, the said Horton Herman resigned as trustee, a copy of which resignation is attached to plaintiff's complaint.

11. That neither Horton Herman nor Harvey Barr is represented by Randall B. Kester, attorney for Clay and Betty Barr, and that any claims made in this court concerning the improper resignation of Horton Herman or the dissatisfaction of Harvey Barr is a collateral issue and not within the issues of this case and in any event the court could make such orders as would protect the said Harvey Barr from sustaining any loss.

12. That this plaintiff specifically denies that his claim of \$15,000.00 referred to in defendants' answer and assigned to Kirschmer, is sham and frivolous and without right or color of right, and alleges that defendants Clay Barr and Betty Barr have refused to authorize the delivery of the sums from the proceeds which are now on deposit with the Clerk of the above-entitled court, in excess of \$15,000.00, to be paid to this plaintiff and the beneficiaries under the "Declaration of Trust" for the sole and only purpose of forcing a settlement of the foregoing action.

13. That the said Harvey Barr is a total stranger to the "Declaration of Trust" and there exists no privity of contract between Clay Barr nor Harvey Barr and has no standing in this court under said "Declaration of Trust".

14. To dismiss the foregoing action would deprive this plaintiff of his remedy against the defendants Barr for the reason that immediately

upon being served with summons and complaint in the Spokane action, the said Barrs moved from Spokane, Washington to Arlington, Oregon and have been residents of Oregon since said time.

Wherefore, having fully answered defendants' answer and defenses contained therein, plaintiff prays for judgment in accordance with his complaint.

FERTIG & COLOMBO,
/s/ By VIRGIL COLOMBO,
TONKOFF, HOLST & HOPP,
Attorneys for Plaintiff

Certificates of Service attached.

[Endorsed]: Filed October 26, 1954.

[Title of District Court and Cause.]

CLAIM IN INTERPLEADER

Come now defendants Clay Barr and Betty Barr, pursuant to the Order of Interpleader entered herein on September 15, 1955, and without waiving their objections to interpleader as set forth in their amended answer on file herein, assert the following claim:

I.

That of the fund of \$44,373.28 deposited in court by Kerr Gifford & Co., Inc., the sum of \$15,000 was expressly reserved to these defendants by the assignment of June 10, 1953, to cover their cost of

harvesting; that their cost of harvesting in fact exceeded the amount of \$15,000; that on or about October 12, 1953, these defendants, for value received, sold, assigned and transferred to A. G. Kirschmer, whose residence was and is Amarillo, Texas, said sum of \$15,000 to which these defendants were entitled from the proceeds of the 1953 grain crop from the Meiss Ranch; that notice of said assignment was duly given to Kerr Gifford & Co.; that said assignment is still in full force and effect; and that said sum of \$15,000 is now owned by said A. G. Kirschmer, and plaintiffs have no rightful claim thereto.

II.

That pursuant to the consent of said A. G. Kirschmer, these defendants hereby assert on his behalf a claim to said sum of \$15,000 out of the proceeds now on deposit with this court.

Wherefore, these defendants pray for judgment against the fund now on deposit with this court in the amount of \$15,000, in favor of these defendants as trustees for said A. G. Kirschmer.

/s/ RANDALL B. KESTER,

Of Attorneys for Defendants Barr

Acknowledgment of Service attached.

[Endorsed]: Filed October 25, 1955.

[Title of District Court and Cause.]

ORDER OF INTERPLEADER

The above-entitled proceedings came on for pre-trial conference on September 12, 1955, and plaintiffs appeared by J. P. Tonkoff, individually and as attorney for plaintiffs, and by Virgil Colombo, of their attorneys; defendants Clay Barr and Betty Barr appeared by Randall B. Kester of Maguire, Shields, Morrison & Bailey, their attorneys; the additional defendant A. G. Kirschmer appeared by William E. Dougherty, his attorney; and defendant Kerr Gifford & Co. Inc. appeared by Harry J. De-Francq of Koerner, Young, McCulloch & Dezen-dorf, its attorneys; and the Court having heard argument of counsel with respect to the answer and counterclaim for interpleader of defendant Kerr Gifford & Co. Inc., it is

Ordered that defendant Kerr Gifford & Co., Inc. is discharged from any and all further liability to either the plaintiffs, the defendants Clay Barr and Betty Barr, or the additional defendant A. G. Kirschmer because of the payment into the registry of this Court by it of the sum of \$44,373.28 on May 20, 1954; and it is further

Ordered that the plaintiffs, the defendants Clay Barr and Betty Barr, and the additional defendant Albert G. Kirschmer interplead their respective demands and claims to said fund of \$44,373.28; and it is further

Ordered that the determination of the amount, if

any, to be paid to the defendant Kerr Gifford & Co. Inc. out of said fund for costs and attorneys' fees be deferred pending further proceedings herein; and it is further

Ordered that jurisdiction of these proceedings be retained by this Court for the purpose, inter alia, of determining the rights of the plaintiffs, the defendants Clay Barr and Betty Barr, and the additional defendant A. G. Kirschmer in and to the said fund.

Dated September 15, 1955.

/s/ CLAUDE McCOLLOCH,
United States District Judge

[Endorsed]: Filed September 15, 1955.

[Title of District Court and Cause.]

MEMORANDUM OF DECISION

Granting plaintiffs complete sincerity, I cannot accept their view of the controlling facts of the case. Landowner Kirschmer exonerates defendant and I do the same. One of plaintiffs' leading witnesses had an obvious interest in exculpating himself, another in paying off an old grudge.

The case has been hard fought, and the parties no doubt will desire to appeal. Will the attorneys please submit orders that will clean the record, so that all of the difficult questions that have been raised during the long drawn out proceedings may be properly presented to the Court of Appeals.

No personal judgment for costs.

Dated November 4, 1955.

/s/ CLAUDE McCOLLOCH,
Judge

[Endorsed]: Filed November 4, 1955.

[Title of District Court and Cause.]

ORDER OF DISTRIBUTION

Findings of Fact, Conclusions of Law and Judgment having been entered herein, it is hereby

Ordered that the sum of \$44,373.28 deposited in the registry of this court by Kerr Gifford & Co., Inc., in connection with its counterclaim for interpleader, be distributed as follows, and the Clerk of this Court is hereby ordered to pay out the following sums from the registry of this court:

(1) The sum of \$15,000.00 be paid therefrom to defendants Clay Barr and Betty Barr as trustees for the use and benefit of the additional defendant A. G. Kirschmer.

(2) From the balance, the sum of \$500.00 be paid to Harry DeFrancq and Koerner, Young, McCulloch & Dezendorf, attorneys for Kerr Gifford & Co., Inc., as attorneys fees with respect to said interpleader.

(3) The balance of said fund, amounting to \$28,873.28, be paid to J. P. Tonkoff, Trustee, and Ton-

koff, Holst and Hopp, attorneys, and Fertig and Colombo, attorneys.

Done in open court at Portland, Oregon, this 8th day of December, 1955.

/s/ CLAUDE McCOLLOCH,
Judge

Approved as to Form:

/s/ W. B. HOLST,
Of Tonkoff, Holst & Hopp

[Endorsed]: Filed December 8, 1955.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on regularly for trial before the undersigned, Judge of the above-entitled court, all parties having waived jury trial, on the 27th and 28th day of October, 1955. Plaintiff appeared in person and as attorney and by David Fertig of his attorneys, and defendants Clay Barr and Betty Barr appeared in person and by Randall B. Kester of their attorneys. Defendant Kerr-Gifford & Co., Inc. did not appear, having previously been discharged from any and all further liability by the Order of Interpleader entered herein on the 15th day of September, 1955. The additional defendant, A. G. Kirschmer, did not appear, having authorized

defendants Barr to assert on his behalf his claim to a portion of the fund now on deposit with the court.

The parties thereupon introduced evidence and rested, and counsel for the respective parties argued the case, and the cause was duly submitted and taken under advisement by the court. Counsel for the respective parties submitted memoranda of law, and thereafter the court handed down its memorandum of decision dated the 4th day of November, 1955, which is by this reference incorporated herein. Now, therefore, being fully advised, the court hereby makes and enters the following:

Findings of Fact

I.

Plaintiff, J. P. Tonkoff, as well as the beneficiaries E. J. Welch and Viola Welch, are residents of the State of Washington. The beneficiaries Roland P. Charpentier and Effie Charpentier and John W. Cramer are all residents of the State of Idaho. The defendants Clay Barr and Betty Barr are residents of the State of Oregon. The defendant Kerr Gifford & Co., Inc. is a corporation of the State of Oregon. The additional defendant, A. G. Kirschmer, is a resident of the State of Texas. The amount in controversy exceeds the sum of \$3,000, exclusive of interest and costs.

II.

On or about the 7th day of May, 1953, defendants Barr entered into a lease of the Meiss Ranch, lo-

located in Siskiyou County, California, from the owners, Frank Hofues and Dorothy Hofues, husband and wife, and Albert G. Kirschmer and Virginia Kirschmer, husband and wife, which lease provided among other things that the lessors would receive as rental 50% of the gross proceeds received by lessees from the operation of said ranch. Prior to said lease said ranch had been operated by J. C. Stevenson, Jr., as manager under a written contract with the owners, and said management contract remained in effect through the 1953 harvest season.

III.

On the 10th day of June, 1953, at Spokane, Washington, on consideration of the settlement of a certain action at law and attorneys' fees therein involved, defendants Barr executed an assignment of their right, title and interest in and to the growing crops to be harvested in 1953 on said Meiss Ranch, to J. P. Tonkoff and Horton Herman, for the benefit of said assignees and Roland P. Charpentier and his wife and E. J. Welch and Viola Welch, his wife, and John W. Cramer, reserving unto defendants Barr the sum of \$15,000.00 from said proceeds to cover their cost of harvesting. Thereafter, on the 10th day of June, 1953 said J. P. Tonkoff and Horton Herman executed a Declaration of Trust providing for the distribution of the assigned portion of the proceeds of said crops among the persons for whose benefit said assignment was made, in the following amounts, or a ratable proportion thereof if the total did not equal \$72,500.00, to-wit:

J. P. Tonkoff	15,000.00 (20.69%)
Horton Herman	10,000.00 (13.79%)
E. J. and Viola Welch	27,500.00 (37.93%)
Roland and Effie Charpentier	15,000.00 (20.69%)
John W. Cramer	5,000.00 (6.89%)
<hr/>	
	72,500.00 (99.99%)

IV.

On or about July 9, 1953, Horton Herman, assignee in said assignment of June 10, 1953, and a beneficiary under said declaration of trust, for value received, sold, assigned and transferred to Harvey S. Barr, a resident of the State of Washington, all of said Horton Herman's right, title and interest as beneficiary under said declaration of trust, and all interested persons were duly notified of said assignment.

V.

Thereafter said crops were harvested and sold to defendant Kerr Gifford & Co., Inc., for the total sum of \$88,746.53. Said sale was made by J. C. Stevenson, Jr., on behalf of the owners for the owners' one-half interest, and by E. J. Welch, on behalf of J. P. Tonkoff and Horton Herman, for the lessees' one-half interest which had been assigned to said Tonkoff and Herman. In the harvesting of said crops the defendants Barr incurred harvesting costs in excess of \$15,000.00.

VI.

On or about October 12, 1953, defendants Barr, for value received, sold, assigned and transferred to said A. G. Kirschmer the sum of \$15,000.00 which

defendants Barr were to receive from Kerr Gifford & Co., Inc. under the terms of the assignment of June 10, 1953, from the lessees' one-half of the proceeds of said crops, and all interested persons were duly notified of said assignment.

VII.

After the harvest and sale of said crops, but before payment by Kerr Gifford & Co., Inc. of the proceeds thereof, plaintiff J. P. Tonkoff made demand upon Kerr Gifford & Co., Inc. for payment to him of all the lessees' one-half of the proceeds of said crops, including the amount of \$15,000.00 which had been reserved by defendants Barr and by them assigned to A. G. Kirschmer. Defendants Barr, on behalf of their assignee, A. G. Kirschmer, also made demand upon Kerr Gifford & Co., Inc. for the payment to A. G. Kirschmer of said sum of \$15,000.00. By reason of said demands, Kerr Gifford & Co., Inc. declined to pay either claimant, and in connection with its counterclaim for interpleader, defendant Kerr Gifford & Co., Inc. paid into the registry of the court the sum of \$44,373.28, representing the lessees' one-half of the proceeds of said crops, including the controverted sum of \$15,000.00.

VIII.

On or about the 26th day of January, 1954, said Horton Herman executed a document stating that he resigned as trustee under the Declaration of Trust of June 10, 1953, in accordance with the demands of E. J. Welch, Viola A. Welch, Roland P.

Charpentier, Effie G. Charpentier, John W. Cramer and J. P. Tonkoff. Said Harvey S. Barr, who then owned the beneficial interest formerly owned by Horton Herman under said Declaration of Trust, did not demand such resignation, nor did he consent to it, and he notified Horton Herman that he objected to and refused to accept such resignation.

IX.

That \$500.00 is a reasonable attorneys fee to be allowed to attorneys for Kerr-Gifford Co., for services rendered.

X.

Plaintiff has failed to sustain the claims alleged in the complaint, and the court finds:

(a) That the defendants Barr did not make any false or untrue warranty with respect to the acreage of growing crops on the Meiss ranch.

(b) That the defendants Barr did not fail, refuse or neglect to farm the Meiss ranch in a good and farmer-like fashion;

(c) That the defendants Barr did not breach or fail to perform any covenant, provision, or condition of the assignment dated the 10th day of June, 1953, or any subsequent promise or agreement.

Now, Therefore, based on the foregoing Findings of Fact, the court makes and enters the following:

Conclusions of Law

I.

That the court has jurisdiction of the parties and of the subject matter of this cause.

II.

That plaintiff is not entitled to judgment against the defendants.

III.

That the sum of \$15,000.00, from the funds now on deposit in the registry of this court, should be paid to defendants Barr as trustees for the use and benefit of the additional defendant, A. G. Kirschmer.

IV.

From the balance, the sum of \$500.00 should be paid to Harry DeFrancq and Koerner, Young, McCulloch & Dezendorf, attorneys for Kerr Gifford & Co., Inc., as attorneys fees with respect to said interpleader.

V.

The balance of said fund, amounting to \$28,873.28, should be paid to J. P. Tonkoff, Trustee, and Tonkoff, Holst and Hopp, attorneys, and Fertig and Colombo, attorneys.

VI.

That a Judgment and Order of Distribution should be entered in accordance herewith.

VII.

That no party should recover costs herein.

Done in open court at Portland, Oregon, this 8th day of December, 1955.

/s/ CLAUDE McCOLLOCH,
Judge

[Endorsed]: Filed December 8, 1955.

In the United States District Court for the District
of Oregon

Civil No. 7,378

J. P. TONKOFF, individually, and J. P. Tonkoff,
as Trustee of E. J. Welch and Viola Welch,
husband and wife, Roland P. Charpentier and
Effie Charpentier, husband and wife, and John
W. Cramer, Plaintiff,

vs.

CLAY BARR and BETTY BARR, husband and
wife, and KERR-GIFFORD CO., a corpora-
tion, Defendants,

A. G. KIRSCHMER, Additional Defendant.

JUDGMENT

The court having found the facts in this cause specially, stated separately its conclusions of law thereon, and directed the entry of this, the appropriate judgment, it is hereby Considered, Ordered and Adjudged as follows:

- (1) That plaintiff take nothing by virtue of this action against the defendants, or any of them;
- (2) That no party recover costs herein.

Done in open court at Portland, Oregon, this 8th day of December, 1955.

/s/ CLAUDE McCOLLOCH,
Judge

[Endorsed]: Filed December 8, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To Clay Barr and Betty Barr, husband and wife,
and McGuire, Shields, Morrison & Bailey and
Randall B. Kester, their attorneys:

Notice is hereby given that J. P. Tonkoff, individually and as trustee, who is the plaintiff above named, appeals to the Court of Appeals for the Ninth Circuit from so much of the judgment entered in this action on the 8th day of December, 1955, as dismisses and disallows plaintiff's cause of action, both individually and as trustee, against the defendants, Clay Barr and Betty Barr, husband and wife, for damages arising out of a breach of contract.

Dated this 28th day of December, 1955.

/s/ FERTIG & COLOMBO,

/s/ TONKOFF, HOLST & HOPP,

Attorneys for Plaintiff

Acknowledgment of Service attached.

[Endorsed]: Filed December 28, 1955.

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

Know All Men By These Presents: That we, J. P. Tonkoff, individually, and J. P. Tonkoff, as Trustee of E. J. Welch and Viola Welch, husband and wife,

Roland Charpentier, and Effie Charpentier, husband and wife, and John W. Cramer, as Principals, and United States Fidelity and Guaranty Company, a corporation duly incorporated under the laws of the State of Maryland, of Baltimore, Maryland, having an office and usual place of business at Portland, Oregon, as Surety, are held and firmly bound unto Clay Barr and Betty Barr, husband and wife, and Kerr-Gifford Co., a corporation, in the sum of Two Hundred Fifty and No/100ths Dollars (\$250.00), lawful money of the United States of America, to be paid to the said Clay Barr and Betty Barr and Kerr-Gifford Co., a corporation, heirs, executors, administrators, successors or assigns, for which payment well and truly to be made and done we bind ourselves, our heirs, executors, administrators, successors and assigns jointly and severally by these presents.

Sealed with our seals and dated this.....day of
....., 19...

Whereas, the aforesaid Principals are filing notice of appeal to the Circuit Court of Appeals of the United States for the Ninth Circuit from the judgment of the District Court of the United States for the District of Oregon in the said suit or proceeding.

Now the Condition of This Obligation Is Such, That if the said Appellant shall pay the costs if the appeal is dismissed or the judgment is affirmed or such costs as the Appellate Court may award if the judgment is modified, then this obligation to be

void; otherwise to remain in full force and virtue.

/s/ J. P. TONKOFF, Individually,

/s/ J. P. TONKOFF as Trustee for Above

Named Plaintiffs and as Attorney

[Seal] UNITED STATES FIDELITY AND
GUARANTY COMPANY,

/s/ By GEORGE H. MAYES,

Attorney-in-fact

Sealed and delivered in the presence of:

/s/ Dorothy Everest

/s/ Gerald H. Robinson

[Endorsed]: Filed December 28, 1955.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OR RECORD ON APPEAL

To the Clerk of the above-entitled Court:

Comes Now the above-named plaintiff, who has appealed to the United States Court of Appeals for the Ninth Circuit in the above-entitled cause, and designates the following as the portions of the records, proceedings and evidence to be contained in the record on appeal:

1. Plaintiff's complaint and documents affixed thereto.
2. Motion of defendants Barr to dismiss.
3. Order denying motion to dismiss of defendants Barr, dated March 15, 1954.

4. Amended answer of defendants Barr filed May 17, 1954.

5. Answer and counter-claim for interpleader of defendant, Kerr-Gifford & Co., Inc.

6. Order bringing in additional party defendant, A. G. Kirschmer, dated June 17, 1954.

7. Motion of A. G. Kirschmer filed August 13, 1954.

8. Resignation of Horton Herman, dated June 26, 1954.

9. Reply to answer of defendants Barr, filed October 26, 1954.

10. Claim in interpleader, filed October 26, 1954.

11. Order of interpleader, filed September 15, 1955.

12. All exhibits being Exhibits Nos. 1-19, inclusive.

13. Reporter's complete transcript of trial proceedings, excluding therefrom the evidence adduced on behalf of Kerr-Gifford in support of attorneys' fees, and further excluding therefrom the evidence adduced on behalf of J. P. Tonkoff for attorneys' fees, trustee's fees and costs.

14. All depositions which were published by order of court and read by the court, namely:

(a) Deposition of A. G. Kirschmer, taken January 5, 1955, at Amarillo, Texas.

(b) Depositions of Clarence F. Enloe, Mary E. Noakes, James H. Noakes and J. R. Ratliff, Jr.; with attached exhibits, all contained in one volume,

but excluding therefrom the depositions of J. C. Stevenson, Sr. and J. C. Stevenson, Jr., whose depositions were also taken and contained in the single volume of depositions, but who testified in person at the time of trial.

(c) Deposition of Frank Kofues.

(d) Deposition of Horton Herman and attached exhibits.

15. Memorandum Decision of trial court, filed November 4, 1955.

16. Order of distribution, dated December 8, 1955.

17. Findings of Fact and Conclusions of Law, dated December 8, 1955.

18. Judgment or Decree, dated December 8, 1955.

19. Notice of Appeal.

20. Undertaking on appeal.

21. This designation of record.

22. Statement of points relied on by plaintiff for reversal of judgment.

You will please include the above data in making up the record on appeal.

Dated this 28th day of December, 1955.

/s/ FERTIG & COLOMBO,

/s/ TONKOFF, HOLST & HOPP,

/s/ J. P. TONKOFF,

Attorneys for Appellant

Acknowledgment of Service attached.

[Endorsed]: Filed December 28, 1955.

[Title of District Court and Cause.]

ORDER DIRECTING TRANSMITTAL OF
EXHIBITS

Upon oral motion of the plaintiff, and it appearing to the court that the plaintiff has appealed from the judgment in this cause to the Ninth Circuit Court of Appeals at San Francisco, California, and it further appearing to the court that the exhibits in evidence in this cause are necessary for a full consideration of the appeal being prosecuted,

Now, Therefore, It Is Hereby Ordered that the Clerk of this court be and he is hereby directed to transmit to the Clerk of the Circuit Court of Appeals for the Ninth Circuit, San Francisco, California, all of the exhibits in this cause, and in addition thereto the depositions in this cause, at the time the designated record is forwarded to the Clerk of the Ninth Circuit Court of Appeals at San Francisco, California.

Done in Open Court this 29 day of December, 1955.

/s/ GUS J. SOLOMON,
Judge

Presented by:

/s/ J. P. TONKOFF,
Of Attorneys for Appellant

[Endorsed]: Filed December 29, 1955.

[Title of District Court and Cause.]

APPELLANT'S STATEMENT OF POINTS

Comes now the appellant and sets forth the following statement of points upon which he intends to rely upon appeal:

I.

The court erred in entering judgment for the defendants and appellees, Clay Barr and wife, and against the plaintiff.

II.

The court erred in its findings of fact in finding that the management contract of J. C. Stevenson, Jr., remained in effect through the 1953 harvest season and that it had any bearing whatsoever in the controversy between the plaintiff, J. P. Tonkoff, and the defendants, Clay Barr and wife.

III.

The court erred in Paragraph 9, sub-section (a) of its findings of fact in finding as a fact that the defendants, Clay Barr and wife, did not make any false or untrue warranties with respect to the acreage of growing crops on the Meiss ranch.

IV.

The court erred in Paragraph 9, sub-section (b) of its findings of fact in finding as a fact that the defendants, Clay Barr and wife, did not fail, refuse or neglect to farm the Meiss ranch in a good and farmer-like fashion.

V.

The court erred in Paragraph 9, sub-section (c) of its findings of fact in finding as a fact that the defendants, Clay Barr and wife, did not breach or fail to perform any covenants, provisions or conditions of the assignment dated the 10th day of June, 1953, or any subsequent promise or agreement.

VI.

The court erred in Paragraph 2 of its conclusions of law in concluding that the plaintiff is not entitled to judgment against the defendants, Clay Barr and wife, for the amount prayed for in plaintiff's complaint.

VII.

The court erred in failing and refusing to find as a matter of fact that defendants, Clay Barr and wife, made false and untrue statements as to the acreage of growing crops on the Meiss ranch.

VIII.

The court erred in failing and refusing to find as a fact that the defendants, Clay Barr and wife, failed, refused or neglected to farm the Meiss ranch in a good and farmer-like fashion.

IX.

The court erred in failing to find as a fact that the defendants, Clay Barr and wife, committed waste in the operation of the Meiss ranch to the loss and detriment of the plaintiff and others similarly situated.

X.

The court erred in failing to find as a fact that the defendants, Clay Barr and wife, breached or failed to perform the covenants, provisions, or conditions of the assignment dated the 10th day of June, 1953, or any subsequent promise or agreement.

XI.

The court erred in failing to enter judgment in favor of the plaintiff against the defendants, Clay Barr and wife, for the amount prayed for in plaintiff's complaint with interest thereon from the 15th day of November, 1953.

Dated this 28 day of December, 1955.

FERTIG & COLOMBO,
TONKOFF, HOLST & HOPP,
/s/ By WILLIAM B. HOLST,
Attorneys for Appellant

Affidavit of Service by Mail attached.

[Endorsed]: Filed January 4, 1956.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Oregon—ss.

I, R. DeMott, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Com-

plaint; Defendants' motion to dismiss action; Order denying motion to dismiss action; Amended answer of defendants Barr; Answer and counter-claim for interpleader of defendant Kerr Gifford; Order bringing in additional defendant and directing issuance of process; Motion to dismiss counterclaim for interpleader; Resignation of Horton Herman; Reply to answer of Defendants Barr; Claim in interpleader; Order of interpleader; Memorandum of decision; Order of distribution; Findings of fact and conclusions of law; Judgment; Notice of appeal; Bond for costs on appeal; Designation of contents of record on appeal; Order directing transmittal of exhibits; Concise statement of points upon which appellant intends to rely upon appeal; and Transcript of docket entries constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 7378 in which J. P. Tonkoff, et al., are the plaintiffs and appellants and Clay Barr, et al., are the defendants and appellees; that the said record has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellants, and in accordance with the rules of this court.

I further certify that there is enclosed exhibits 1 to 19, inclusive. Depositions in four volumes are being forwarded under separate cover and the reporter's transcript of testimony will be forwarded at a later date.

I further certify that the cost of filing the notice of appeal, \$5.00 has been paid by the appellants.

In Testimony Whereof I have hereunto set my

hand and affixed the seal of said court in Portland,
in said District, this 1st day of February, 1956.

[Seal] R. DeMOTT,
 Clerk
/s/ By THORA LUND,
 Deputy

In the United States District Court for the
District of Oregon

Civil No. 7378

J. P. TONKOFF, individually, and J. P. TON-
KOFF, as Trustee of E. J. Welch and Viola
Welch, husband and wife, Roland P. Charpen-
tier and Effie Charpentier, husband and wife,
and John W. Cramer, Plaintiff,

vs.

CLAY BARR and BETTY BARR, husband and
wife, and KERR-GIFFORD CO., a corpora-
tion, Defendants,

A. G. KIRSCHMER, Additional Defendant.

TRANSCRIPT OF PROCEEDINGS

Portland, Oregon, October 27, 1955

Before: Honorable Claude McColloch, Chief
Judge.

Appearances: Messrs. Tonkoff, Holst & Hopp,
by Mr. J. P. Tonkoff and Mr. William B. Holst,
and Mr. David H. Fertig, Attorneys for Plaintiff.

Messrs. Maguire, Shields, Morrison & Bailey, by Mr. Randall B. Kester, Attorneys for Defendants Clay Barr and Betty Barr. husband and wife. [1*]

The Court: Gentlemen, are you ready in this case?

Mr. Tonkoff: Plaintiff is ready, your Honor.

The Court: Do you have a pre-trial order?

Mr. Kester: I do not, your Honor.

The Court: Did you make an effort to agree on one?

Mr. Kester: No, there has been nothing said about a pre-trial order.

The Court: As a matter of course, Mr. Kester, I think you know in these cases under our practice we have a pre-trial order. But we will go ahead without it now. Put on your first witness.

Mr. Fertig: If the Court please, at this time, as a preliminary matter, Mr. Tonkoff with the consent of the Court has appeared in this case. It is his case originally. We have filed a motion requesting that Mr. Tonkoff of the State of Washington, who is admitted to practice before the Supreme Courts of the State of Oregon and State of Washington and the United States District Court in Washington, and also the Circuit Court of Appeals of this District, as well as his partner, Mr. William Holst, who has the same qualifications, be permitted to appear in this case on behalf of plaintiff. We are ask-

* Page numbers appearing at top of page of original Reporter's Transcript of Record.

ing if the Court will allow as a matter of record this order to be entered.

The Court: Any objection? [2]

Mr. Kester: No.

The Court: So ordered.

Mr. Fertig: Thank you.

JAMES C. STEVENSON

was produced as a witness in behalf of the Plaintiff and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Tonkoff:

Q. State your name, Mr. Stevenson.

A. James C. Stevenson.

Q. What has been your occupation?

A. I can't understand you.

Q. What has been your occupation, Mr. Stevenson?
A. I am a farmer and stockman.

Q. How long have you been engaged in that occupation?
A. All my life, 50 years.

Q. Where have you carried on your occupation, chiefly?
A. In the Klamath Basin.

Q. How long would you say you had been farming and raising stock there?
A. Since 1911.

Q. Did you acquire a certain piece of property spoken of [3] as the Meiss Ranch?

A. Yes, sir.

Q. When did you acquire that property?

A. In April, 1944.

(Testimony of James C. Stevenson.)

Q. Where is that property located?

A. It is in Siskiyou County, about five miles west of Macdoel, California.

Q. That is in California, you say?

A. Yes.

Q. How many acres does that consist of, that ranch?

A. 13,160 acres of deeded land.

Q. Would you just describe to the Court the terrain there and what the ranch consists of.

A. Well, there is about 3,000 acres of peat land, and there is meadow and hay land, alfalfa land, and then there is pasture and sagebrush land. Most of it is irrigated.

Q. What portion of that property can be cultivated, planted to grain?

A. Well, in the lake proper there is 3,000 acres in that, but there is other land that we have farmed besides that.

Q. Besides the 3,000 acres you have other property that is tillable?

A. Yes, that we have irrigated with pumps.

Q. Now you said you acquired the property when? A. 1944. [4]

Q. After you acquired the property did you make any improvements on it, Mr. Stevenson?

A. Oh, yes. It was a big lake, and we drained the lake and built a dike and burned all these tules off and worked the last of it up.

Q. What did you do with the water that was in the tules?

(Testimony of James C. Stevenson.)

A. We pumped it over the dike to the east, and it left about 3,000 acres in this one part.

Q. On what portion of the property is the dike located? A. On what part of it?

Q. Yes.

A. It runs about four miles through the property. I would say about halfway east of the buildings.

Q. What crops did you grow there while you were the owner of the ranch, Mr. Stevenson?

A. We raised mostly barley, and we had oats, wheat and rye.

Q. Who was managing or running the property at that time, at the time you owned it?

A. I was the manager, but my son was the foreman.

Q. When did your son start to manage the property after you acquired it?

A. When did my son?

Q. Yes. A. The next year after.

Q. Starting with what year? [5]

A. '45.

Q. How long did he remain as foreman or manager under you?

A. Well, I think he was off of the place about three years during that time.

Q. When did he finally leave the property?

A. You mean after I sold it?

Q. Yes, I mean after you sold it.

A. I don't get the question.

(Testimony of James C. Stevenson.)

Q. When did you sell the property, Mr. Stevenson? A. I sold the property in '52.

Q. At that time was your son still on the property as foreman? A. That is right, yes.

Q. Did he remain on the property after you disposed of the property as foreman?

A. Yes, he was retained by Mr. Hofues.

Q. Whom did you sell the property to?

A. Hofues and Kirschmer.

Q. What was Hofues' first name?

A. Frank Hofues.

Q. And A. G. Kirschmer of Texas?

A. Yes.

Q. After you sold the property to Mr. Hofues and Mr. Kirschmer did you retain or reserve any of the pasture land?

A. I rented all the pasture. [6]

Q. Did you rent it for the year 1953?

A. Yes.

Q. How many acres did you rent from them that year, Mr. Stevenson?

A. I rented it all.

Q. What?

A. I rented all the pasture.

Q. How many acres did it consist of?

A. Well, I rented the whole ranch. It was 13,160 acres. I rented the whole ranch.

Q. How many cattle did you have on that ranch in 1953?

A. We had a little over a thousand head.

Q. A little over a thousand? A. Yes.

(Testimony of James C. Stevenson.)

Q. Would you describe to the Court the condition of the soil on that property, or what kind of soil it was.

A. Well, there is about three types of soil there. There is some alkali soil, and then there is some awful good land. It is supposed to test higher than any land in Siskiyou County. It tests 75 per cent.

Q. That is the soil that used to be——

A. That is where the tules was. Then there is some heavy dobe land that cracks open when it is dry. It is regular dobe land.

Q. Is that soil suitable for growing grain crops?

A. We raised grain on all of this land that I have described, yes.

Q. Now, can you tell us about what kind of production you got from raising wheat there.

A. What do you want to know?

Q. The pounds per acre.

A. Well, about a ton to the acre of wheat.

Q. About 2,000 pounds to the acre?

A. Yes.

Q. What about rye?

A. Well, rye you generally get around 1200 to 1500 pounds to the acre.

Q. How much oats? What was the production on oats?

A. A good year you would get around 3,000 pounds of oats.

Q. Let's see. What other crops?

A. Barley.

Q. What was your production on barley?

(Testimony of James C. Stevenson.)

A. In good years it run around 3,000 pounds.

Q. During the year 1953 can you describe or tell us what the growing conditions were in Klamath or in the vicinity of this ranch?

A. It was a very good year in '53. We had quite a few rainstorms, and it was a good growing year.

Q. How did that compare with other years, Mr. Stevenson?

A. Well, it was really better than some years. Of course, [8] in '47 we had a year similar to that.

Q. Would you say that was one of the outstanding years for favorable growing conditions?

A. In '47 we had the best crop that we ever raised there.

Q. About how high does the grain grow there if it is properly cared for and cultivated, Mr. Stevenson?

A. Well, the grain—I have some pictures of the grain there. The barley will get up, oh, waist-high, and just thick. But then when it gets so heavy it just mats down. And the oats gets up as high as under your arms. I have a picture of a man over six feet tall with his arms out this way, and the oats is right under his arms.

Q. Do you have any of those pictures with you?

A. I haven't, no.

Q. You didn't bring them with you. How often did you go on the ranch in 1953?

A. How often? Oh, I was there every week, I think once a week, anyway.

Q. During the growing season?

(Testimony of James C. Stevenson.)

A. Because I had my cattle there.

Q. Now, would you mind telling the Court just what the condition of these crops was in the middle of June?

A. The crops were very good in the middle of June.

Q. Did you notice a change in those crops during the growing season? [9]

A. Yes, there was quite a change on the upper—what we called the upper land.

Q. What did you observe as to the change?

A. Well, it was drying out.

Q. Can you grow crops down there without irrigating, Mr. Stevenson?

A. Oh, they do grow dry land grain there, but this particular place we irrigated.

Q. Was there ample water to supply irrigation during the year 1953? A. Yes, there was.

Q. Where did you get your irrigation water?

A. Well, we have a big lake there, and then we have creeks running into the place and we have wells.

Q. How many wells did you have on the ranch?

A. There was seven wells.

Q. Did you have pumps for them?

A. I don't think there was pumps in all of them. I think there was one that didn't have any.

Q. Could you get water out of the lake, out of the dike? A. Oh, yes.

Q. You say that there was plenty of water to irrigate in 1953?

(Testimony of James C. Stevenson.)

A. Yes, and there was a big pump to pump out of the lake that we used to irrigate with. [10]

Q. Can you tell the Court what you observed concerning dryness in 1953 along about harvest time? Did you see the condition of the ground?

A. Yes.

Q. Would you tell the Court what condition the ground was in.

A. Well, the ground on this upper land was all cracked open. There wasn't much there.

Q. Would you describe how wide those cracks were, Mr. Stevenson.

A. Oh, they run from an inch to three or four inches wide.

Q. What portion of these cracks extended over the cultivated fields?

A. How big an area, you mean?

Q. Yes.

A. Well, there was one piece up there—we always called it 400 acres—and that is where the dobe ground is. And then along the edges, along the edge of the big field, there must have been a hundred or more acres of heavy dobe land that cracked open.

Q. During the summer did you consult with Mr. Barr concerning the lack of irrigation or the dryness of the crops?

A. Yes. He used to ask my opinion on what to do on the place.

Q. What did you tell him? [11]

A. Well, I told him I would irrigate it on the

(Testimony of James C. Stevenson.)

upper land there, and I told him to be very careful not to get the water down too far in there.

Q. Did you specifically mention to him that there was not sufficient water on the property to produce a crop?

A. He knew that. He could see that. I told him sure, there was plenty of water, and the pumps was already there.

Q. Now did you observe anything about the condition of the crops concerning weeds?

A. Yes, there was a couple of fields going over to the east side that had weeds in them.

Q. What was the condition of those fields?

A. As to weeds, you mean?

Q. Yes.

A. The grain was up and the weeds was coming awful thick, and I asked Mr. Barr if he was going to spray for the weeds, and he said he was.

Q. Did he spray?

A. I don't think he sprayed then. I think he sprayed down one of the big canals. I don't think he sprayed out in the grain at all.

Q. What is the custom concerning spraying down there, spraying weeds?

A. They all spray for weeds whenever——

Q. Would you describe to the Court about how many acres [12] were taken by weeds?

A. Well, maybe 300 acres.

Q. What kind of crops were growing there?

A. I think he had barley in one of them and rye in the other one.

(Testimony of James C. Stevenson.)

Q. Did he harvest any part of that 300 acres, Mr. Stevenson?

A. Yes, he patched it out. He went in there and where the weeds wasn't too thick, why, he patched it out.

Q. About how many acres were not harvested due to the weeds?

A. I don't know. I couldn't hardly answer that. I wouldn't know.

Q. Do you know whether any of the grain was plowed up?

A. Yes, there was some of it plowed up.

Q. About how much was plowed up, Mr. Stevenson?

A. Well, I suppose about 200 acres.

Q. About 200 acres? A. Yes.

Q. Now, in your arrangement to pasture your cattle on the property were you paying a rental for that? A. I was, yes.

Q. Did you get any discount on your rental due to the fact that some of the crops were plowed up and were not available for pasture after the crops were harvested? [13]

A. Yes. Mr. Hofues reimbursed me for that.

Q. On how many acres were you reimbursed?

A. I think we settled for 300 acres. Some of it wasn't grain land that was plowed up. Some of it was alfalfa ground that was plowed up.

Q. Now, when would you run your cattle into the ranch there for pasture?

(Testimony of James C. Stevenson.)

A. They was on the ranch all summer. We turned them in the grain after they got done.

Q. After the grain was harvested did you go out through the fields to observe the manner in which it was harvested? A. I did, yes.

Q. Tell the Court what you found, Mr. Stevenson.

A. Well, it looked to me like a very sloppy job of harvesting. They lost quite a lot of grain.

Q. How did they lose it by harvesting?

A. Well, it looked to me like they traveled too fast, and some of it they didn't cut. It just pushed it over. A lot of it went over the back end into the windrow, too.

Q. Did it remain in the field? A. Yes.

Q. You ran your cattle over there in the field after the grain was harvested? A. Yes.

Q. Did you lose any cattle by reason of the grain that was [14] left on the field?

A. We did, yes.

Q. Would you explain how that happened?

A. Well, there was two cows bloated there. We cut them open to see what was the matter with them, and they was plumb full of grain.

Q. Is that customary if the grain is properly harvested? Do you usually have that much grain left there?

A. We never lost any cattle before that.

Q. In your experience is it your opinion that it was due to the excess of grain that was left in the field that was not harvested?

(Testimony of James C. Stevenson.)

A. Well, it might have been what was left in the field that was not harvested, or after it had been harvested and blowed over.

Q. Do you know whether or not Mr. Barr irrigated during 1953?

A. Irrigated the grain?

Q. Yes.

A. He didn't. No, I don't think he did.

Q. How often were you on the ranch, Mr. Stevenson?

A. I was on the ranch—well, I would be there once a week all summer. I had a man there taking care of the cattle, and I used to go to see how he was doing.

Q. Can you estimate, Mr. Stevenson, about how many pounds [15] per acre was left over? I mean that was spilled or was not harvested and left in the field?

A. Well, I didn't examine all these windrows. It was a pretty big field. My hired man called my attention to what grain was left in the fields. We was riding out there, and we would ride from one windrow to another in different places on the ranch, and we would get down and spread the windrows open and see the grain laying on the ground. From what I observed in the windrows and looked at it looked like there was about four or five hundred pounds of grain to the acre was left.

Q. That was not harvested and was left in the fields?

(Testimony of James C. Stevenson.)

A. Due to the fact it was blown over. It was harvested, but it was blown over.

Q. It wasn't delivered, anyway, it was left in the field?
A. Yes.

Q. I see. What was the size of the grain this particular year? How high did it grow, Mr. Stevenson, as you saw it?

A. Oh, on the good grain it was waist-high.

Q. When you say "good grain," was that grain that was well irrigated or moist?

A. That is some of this good ground. It holds moisture and it don't need to be irrigated. That is ground—it was irrigated when they put it in, but after it is farmed you don't have to irrigate it only the once. [16]

Q. What was the condition of the grain where it was drier and was not irrigated, where the ground was allowed to dry out.

A. It was very thin.

Q. What?

A. It was very thin and dried-up, also.

Q. How high was it?

A. Some of it was from four inches to maybe a foot high, and very thin.

Q. Now, having farmed the land and having grown grain in that country for many years, could you estimate about what percentage of the crop was harvested in the condition that it was? I mean in your estimation would you say this property was farmed in a good, farmerlike manner?

(Testimony of James C. Stevenson.)

A. It looked like it was a very slipshod way of farming to me. I wouldn't have had it done if I was—it would have been farmed different if I was doing it.

Q. Had it been farmed in a good, farmerlike manner, what in your opinion would it have produced by way of tonnage in barley, rye and wheat?

A. The year I was telling you about, in 1947, the grain averaged 3,000 pounds; that is, oats and barley.

Q. Oats and barley averaged that?

A. 3,000 pounds to the acre.

Q. What did the wheat yield? [17]

A. Well, wheat, about a ton, and rye about twelve or fifteen hundred pounds.

Q. Was there any frost that year during harvesttime?

A. Well, there might have been at harvesttime, but in the growing season there wasn't no frost.

Q. Were the crops affected by frost?

A. I don't think so.

Q. When did Mr. Barr take over the ranch that year, do you know?

A. It was sometime in May.

Q. Of 1953? A. That is right.

Q. On how many occasions did you see him on the ranch, Mr. Stevenson, during that summer?

A. Oh, I saw him several times. I don't remember just how many times. I saw him when he was putting the grain in, and I seen him afterwards.

Testimony of James C. Stevenson.)

Q. Did you give him any advice concerning the planting and the growing?

A. Yes, he asked me for advice as to what to do, and I told him what I do.

Q. What did he ask you? On what subjects did he ask you?

A. Well, he asked me about the irrigation of it, and he asked me about putting these paddles on these tractors so he could get the crop in earlier. The ground was pretty wet, [18] and we always put these wide extensions on our tractors so we could go out in wetter ground and work.

Q. Did he follow your advice concerning irrigation? A. I don't think he did.

Q. Did he follow your advice concerning the spraying of the crops? A. No, he didn't.

Mr. Tonkoff: Your Honor, I have a map here which I would like to have identified. I don't know what the rules are concerning showing it to the witness. I will ask him to identify it first.

Q. Mr. Stevenson, can you identify what that represents?

A. This is the Meiss Ranch. This is the dike that goes across and the lake is over on this side.

Q. Does that map disclose or represent the dike and the lake and the farming area of the Meiss Ranch? A. Pretty well, yes.

Mr. Tonkoff: I will offer it in evidence, your Honor.

The Court: Admitted.

(Testimony of James C. Stevenson.)

(The map referred to was received in evidence and marked Plaintiff's Exhibit 1.)

Mr. Tonkoff: Q. There is an area that is shown on the map there marked "Lake," is there not? Do you notice that on the map?

A. Where it is marked "Lake" that is the sump where we pumped [19] water over into——

Q. Does that lake dry out in the summertime?

A. Well, this year it did, but it hadn't been dry for several years.

Q. Is that a fresh-water lake?

A. It is fresh water. It is all snow water and fresh water that runs in there.

Q. That water that is pumped from the lake is the runoff from the mountains and hills, is it?

A. It is all snow water.

Mr. Tonkoff: That is all at the present.

Mr. Kester: If the Court please, I have another map on a larger scale. Will you show this to the witness.

Cross Examination

By Mr. Kester:

Q. Mr. Stevenson, do you recognize that as an enlargement of a map that you had while you were on the place?

A. What was the question?

Q. Do you recognize that as an enlargement of a map that you had while you were on the place?

A. Well, it looks like a map that we have had.

Mr. Kester: I would like to have that marked, and I offer it in evidence also.

(Testimony of James C. Stevenson.)

The Court: Admitted. [20]

(The map referred to was thereupon received in evidence and marked as Defendants' Exhibit 2.)

Mr. Kester: Q. Mr. Stevenson, this map that you identified in Mr. Tonkoff's examination, which is Exhibit No. 1, dated August of 1951, has a legend on it with respect to the classes of soil. Are you familiar with that yourself, like what Class 1, Class 2 and Class 3 soil may be?

A. Well, I was at one time, but I don't know if I would be now.

Mr. Kester: I have another map that I would like to have marked also, if I may, please.

The Court: Yes.

(The map referred to was thereupon marked as Defendants' Exhibit 3 for identification.)

Mr. Kester: Q. Do you also recognize Exhibit 3 as a soil map of the Meiss Ranch showing in different colors the different classes of soil?

A. We had a map of the Soil Conservation with different colors similar to this.

Q. Does that show the same information that this shows, orange as Class 2, red as Class 3, and so on?

A. Well, I think this orange is supposed to be some of the pasture ground, isn't it? [21]

Q. It shows on there as Class 2, does it not?

A. I don't know where it says that. Oh, yes; Class 2 is the red—Class 2 is the orange and red is 3 and blue is——

(Testimony of James C. Stevenson.)

Q. Do you recognize having seen that type of map before? A. Yes, yes.

Q. And you recognize that as a map of the Meiss Ranch, do you? A. Well, it looks like it.

Mr. Kester: We will offer it in evidence, also.

Mr. Tonkoff: May we see it, your Honor?

The Court: That is why we have the pre-trial order practice here, and we don't have this fooling around with exhibits. You will have to look at that later. For the present it is admitted. You will have to look at these exhibits at recess. Exchange them between each other.

Mr. Kester: May we have it put on the board?

The Court: All right. It is admitted.

(The map referred to was received in evidence and marked as Defendants' Exhibit 3.)

Mr. Kester: Can your Honor see that all right?

The Court: I am getting along all right, Mr. Kester.

Mr. Kester: Q. Mr. Stevenson, would you indicate with the pointer there on the big map above the outlines of the Meiss Ranch.

A. Well, the Meiss ranchhouse is probably down about in [22] here. It goes around like this.

Q. The heavy black line around the outside, does that indicate generally the exterior boundaries of the ranch?

A. That is right. This line is the outside boundary.

Q. Will you show us where the dike is that holds the lake back?

(Testimony of James C. Stevenson.)

A. The dike runs right across about here.

Q. On which side of the dike is the water stored?

A. The water is stored in this territory.

Q. East of the dike? A. That is right.

Q. Can you take a pen and mark there the word "Dike" so that it can be identified?

A. You want me to write it on there?

Q. Yes, just write it on the map. Show where the dike is. Now where is the boundary of the old lake bed area which was drained by means of that dike on the west?

A. The land that we reclaimed?

Q. Yes.

A. From this dike it runs way up in here like this. This is the boundary line here.

Q. That is where the water originally was before you reclaimed it; is that right?

A. That is right.

Q. Now the area within the bed of the old lake is what you [23] referred to as being peat land, I presume? A. That is right.

Q. Out in the middle of the old lake bed?

A. Along in here. This is the peat land here.

Q. You spoke of some heavy dobe ground up on the west side, up around the fringe of that. Would you indicate that. A. Right in here.

Q. And I believe you said there was about 400 acres of that; is that correct?

A. There was 400 acres in this spot here, and then I said there was a couple of hundred acres along the edge here like this.

(Testimony of James C. Stevenson.)

Q. So there is about 600 acres that is of that dobe consistency? A. That is right.

Q. Now, that dobe ground is sticky gunbo when it is wet, isn't it? A. It is.

Q. When it is dry, it bakes out pretty hard, doesn't it? A. That is right.

Q. Can you with a pen mark those areas that you have described as dobe ground and put an "A" in the center of the area that you have marked there for the dobe? A. You want me to put—

Q. Just mark it in the areas that you have indicated.

A. This is the dike here. You want me to put that on the [24] dike?

Q. Put an arrow pointing to where the dike is from whatever word you put there so we can find it later. Now up in the northeast part of the ranch, northeast of the lake, that is all sagebrush, isn't it?

A. This area?

Q. Yes. A. That is right.

Q. That is not under cultivation at all?

A. That is pasture ground up in there, and in here and around in there is all pasture.

Q. Down in the southeast corner that land was all rented out to Mr. Noakes, wasn't it?

A. Well, all this land right over in here was rented to Noakes, yes. This here and down to there, a strip like this, and then it jogged over here. Section 6, I guess it is.

Q. Now the water that comes into that lake

(Testimony of James C. Stevenson.)

comes down off the mountains around there, does it not?

A. From up on this side here, from the mountains, and then there is a creek runs in here they call Prather Creek.

Q. That ranch is situated at about what elevation?

A. 4250, or around that, 4235 or 4250. Around 4250.

Q. Around 4250 feet elevation?

A. That is right.

Q. The lake has no natural outlet, does it? [25]

A. No outlet to the lake.

Q. What? A. No outlet.

Q. So that that water in the summertime gets rather brackish and alkaline, doesn't it?

A. In the latter part of the season it does. In the first runoff, up until about the 1st of July, it is very good water, until it starts evaporating, and then it gets alkaline.

Q. Now in the early part of the season you never need the water anyway, do you?

A. No, not up until the 15th of June, anyway. The way we irrigate it, we flooded all the area early in the winter, and then pumped it out. That was the first irrigation. That is what we call pre-irrigation.

Q. You do that in the wintertime?

A. You do that in the wintertime, and pump this all out, and then farm the land afterwards. Then we don't have to irrigate only around the edges after that.

(Testimony of James C. Stevenson.)

Q. Drainage is quite a problem there, isn't it?

A. It takes quite a lot of pumping, yes.

Q. There are canals dug across the fields in several places to drain the water off, are there not?

A. Yes, there is a big canal—there is one across here and one down through here, and then there is another one through here and one across here (indicating on map), and they all run [26] to this spot here, drain to this spot here. There is three big pumps there to pump it out.

Q. Those are there to get rid of the excess water, are they not?

A. That is what they are for, yes, to keep the water table down.

Q. Because too much moisture will damage a grain crop during the growing season, will it not?

A. That is right.

Q. Now, did you ever spray while you were operating the ranch?

A. Never did. We tried a sprayer at one time on a little piece of land there the year before I left.

Q. You mentioned a figure of 3,000 acres of cultivated land. Had you ever had that surveyed, actually measured?

A. This territory here on this end here, I rented that to a party in '49 and they had it surveyed.

Q. Is that the map there that resulted from that survey? A. What was that?

Q. Is that the map there that resulted from that survey? I think that bears a date in 1949.

Testimony of James C. Stevenson.)

A. I don't think so. No, I don't think so. I don't think they made a map of it.

Q. When you give the figure of 3,000 acres is that based on that survey or is that just an estimate or what? [27]

A. No, it was made—I rented this land at so much an acre, and they paid me for 3,000 acres. But they claimed there was a little more than 3,000 acres in it.

Q. Actually there were about 3,300 acres; isn't that so?

A. They claimed there was something over 3,000 acres, but I let them have it for 3,000. We just called it a flat 3,000.

Q. So you are satisfied there is really more than 3,000 acres in cultivation? A. Yes.

Q. Now around the edges of the old lake bed there is a lot of alkali in that soil, is there not?

A. There is.

Q. And along the west side of the dike that holds the lake back that alkali is quite serious, is it not?

A. There is a strip along here, up in here, there is a strip that has some alkali in it, yes.

Q. That has never grown any crop at all, has it?

A. Right close to the dike, no.

Q. Yes.

A. That is in pasture along there.

Q. Yes.

A. There is a long strip in pasture about an eighth of a mile away from the dike.

(Testimony of James C. Stevenson.)

Q. About the only thing that ever grows there is salt grass, [28] isn't it?

A. That is right.

Q. Now, during the summer of 1953 did you observe that there was a patch of about 200 acres of pasture land in the middle of the old lake bed that was in potatoes?

A. It wasn't in the middle. It was right down at this end, way down here at this end (indicating).

Q. It is on the south side, but in the middle east and west? A. Yes.

Q. That is right. That is the best ground on the ranch, isn't it?

A. That is some of the best, yes. It is some of the best land.

Q. You spoke of an area of about 700 acres that was in quite serious weeds during the summer of 1953. Can you indicate with your pointer where that lies on the map?

A. Well, there is a big ditch goes right across here over to this point here, and then there is another ditch runs right down here this way. All this in here and in here is weed crop. There is a big ditch runs down through here.

Q. Would you take the pointer again and mark "Weeds" for that area that you have indicated so we can find it. Referring to that weed patch, as we will call it, did you ever have trouble there with weeds yourself? [29]

A. The last year we was there we had quite a

(Testimony of James C. Stevenson.)

few weeds in this particular piece, and we had a little strip here——

Q. That area was always subject to weeds, was it not?

A. No, it wasn't always. There wasn't any weeds, as I say, just the last year we was there we had some weeds there, and every year afterwards it got worse.

Q. It kept getting worse? A. Yes, sir.

Q. As a farmer isn't it a fact what usually happens if an area goes to weeds it keeps getting worse?

A. It will if they don't spray for it.

Q. You never did spray yourself, I believe you said.

A. No, we never had any weeds on the ranch until this last year when we had this little area here with weeds.

Q. The area you have described as dobe ground up on the west side, did you ever get much of a crop off of that?

A. Oh, yes, we always—some years we would get more than others. It would all depend on how—that dobe ground, you have to be very particular about how you farm that. Three or four days makes a lot of difference in farming it.

Q. That dobe ground takes quite a bit of preparation before seeding, doesn't it?

A. Yes, it does.

Q. It needs a lot of plowing and harrowing?

A. Yes, you have to be a good farmer and build

(Testimony of James C. Stevenson.)

a good mulch [30] on it so you can hold the moisture and so it won't crack open. If you just scratch it in like you do some of this lighter ground, why, it won't grow.

Q. So the secret of getting a good crop on a dobe ground is in the soil preparation before plowing, isn't it? A. That is right, yes.

Q. Most of those wells that you spoke of during 1953 were used by the people growing potatoes and for the pasture land, were they not?

A. Well, I think there was spuds put in adjoining us on the ranch, and from what I understand—of course, I never rented it, but what they told me, that the spud man had the priority on the well.

Q. They had priority on the water?

A. That is right.

Q. Next to the potato man you had priority for your pasture land on the water, didn't you?

A. No; according to my agreement I could take water whenever I wanted to.

Q. You had preference over the grain part of the ranch, then, so far as getting water?

A. That is right.

Q. That is right, is it? A. That is right.

Q. You mentioned a couple of cows that got bloated. Do you [31] know where they picked up that grain?

A. Well, they ran all over this territory here. One of them died right over here, about there, and the other one was over in here (indicating).

(Testimony of James C. Stevenson.)

Q. Both of them were down in the area that you referred to as being very weedy, were they not?

A. Well, one of them was in the edge of the weeds, yes.

Q. And the other one was just on the other side of the weeds?

A. Over in this other grain.

Q. Do you recall the spring of 1953 as far as the weather was concerned?

A. Yes, I do. It was a very good growing season that year. There wasn't much frost, and there was quite a few rainstorms in June.

Q. It was a late, wet spring, wasn't it?

A. It was, yes.

Q. It rained practically all the month of May and the first half of the month of June, didn't it?

A. Well, I wouldn't say all the time. It rained quite a lot.

Q. You observed that there was difficulty in getting the crops planted because the ground was so wet it couldn't be worked, didn't you?

A. Yes. That is one thing, and then there was—it was [32] too late to pump the water off, too.

Q. In fact, you advised Mr. Barr to put some big paddle wheels on the tractors to keep them from sinking down in the ground, didn't you?

A. I told him he could drill it into that kind of ground. I asked him if he was familiar with the ground, and if he had these paddles on, I says, "You can drill it when it is right wet and it won't hurt this ground down in here."

(Testimony of James C. Stevenson.)

Q. That is in the bottom?

A. Yes, he could drill it in and it wouldn't hurt it. And then after he got the grain in he told me he wished he had taken my advice and that he would have got the grain in a little earlier.

Q. He did take your advice, didn't he? You saw him using the tractors with the paddle wheels on them?

A. I don't think he ever put them—he could have put them on later. I didn't notice that.

Q. You didn't notice much about it?

A. I believe he did put them on one.

Q. That was your recommendation?

A. Yes.

Q. He also consulted you, didn't he, about irrigating the land during the summertime?

A. He did, yes.

Q. And didn't you caution him about getting too much water [33] on and tell him that he had to be very careful and not get too much water on?

A. I asked him if he was familiar with irrigating, and I told him that this area up in here and this along here——

Q. You are referring now to the dobe ground?

A. Yes—that he could irrigate that, but not let the water get too far down in here because if he did it would make the grain stay green, as we call it, the second-growth come up, and it would be pretty tough cutting.

Q. And if by reason of the second-growth or

(Testimony of James C. Stevenson.)

third-growth the harvest was delayed there was a chance of getting caught by frost, wasn't there?

A. That is what I told him there would be, if he got water down in there.

Q. Now frost is a very serious problem at that elevation in that country, isn't it? A. It is.

Q. You can have frost almost any time of the year, can't you? A. You can, yes.

Q. There has been frost in the middle of the summer there, hasn't there?

A. Frost damage any time there, yes.

Q. When you get into October you are just gambling on whether you will get caught by the frost, are you not? [34]

A. After that time of year the frost wouldn't hurt. It would do you good. It would ripen your grain crop up so you could cut it.

Q. Yes, but if you were not ready to harvest, if the grain was still green, it could be killed by frost at that time, couldn't it?

A. No, you don't understand. On the second-growth your other grain would be ripe, but your second-growth comes up so you can't cut your other grain. Your second-growth don't make grain. It is just the green foliage that holds you back from harvesting the good grain.

Q. And the good grain, then, would be caught by frost if you were delayed to that extent?

A. That is right. It would make you late harvesting, and it might rain and spoil your grain.

Q. Then you might lose the whole crop?

(Testimony of James C. Stevenson.)

A. You might lose all of it, yes.

Q. This dobe ground that you spoke of up on the west end had never been prepared for irrigation, had it?

A. Yes, in a way. It hadn't been leveled to grade, but there was ditches where we used to just run the water.

Q. It was not level, was it?

A. It wasn't leveled to grade, no.

Q. If you put water on, the water would naturally just run off down to the lowest point there, wouldn't it? [35]

A. That is right. If you didn't take care of it and get out ahead of it and irrigate it right.

Q. You couldn't irrigate completely with water because it had not been leveled and ditched for that purpose, had it?

A. You would not get water on all of it, but you would get it on the biggest portion of it if you took and irrigated it right.

Q. If you irrigated that dobe ground, wouldn't the water just tend to run off down toward the bottom land below it?

A. If you didn't take care of it. If you just turned the water loose, it would be bound to go down on the lower ground, yes.

Q. There wasn't anything you could do there but turn the water loose, was there?

A. Well, I farmed it for several years, and it never was turned loose. I always had men out in front of it spreading the water, and when it got

(Testimony of James C. Stevenson.)

Q. So far I would change it to another position. It was very easy to irrigate the most of it. There was some of this land up in this corner here that you couldn't irrigate very well, but this land down in here where I cautioned him, all of it could be irrigated with some work, but you had to get out there and work at it.

Q. This crop you had in 1947, that was the best year you ever had, wasn't it?

A. Yes, that is. I think we had more tonnage that year and a better price, too. [36]

Q. Do you remember what tonnage you had in any other year?

A. Oh, I don't know what tonnage I had. I don't even know what the tonnage was in '47, but I do know about how many cars we had in '47.

Q. Did you always have the same fields in the same kind of grain, or did you change around and rotate?

A. No, we generally planted barley in most of this country here year after year, and we planted oats up in here and oats in here, and some wheat down in here and down in here, and we planted rye over next to here.

Q. You don't know how many carloads you had in any year besides '47?

A. No, not right close, because we shipped a lot of grain out by truckloads, trucks, after that.

Q. So that your estimate there of how many pounds per acre of this and that is based on the year 1947, is it?

(Testimony of James C. Stevenson.)

A. Well, that is the first—you see, this was all tule land, all this here was tule land, and we only got it in '44. And this was '47 when we got this big crop, and that was the first year we had it all in, so we naturally would have the biggest crop on the virgin soil.

Q. And that is the year that you got the crops of the size that you have already described?

A. That is right. [37]

Q. You spoke about seeing some area that had been plowed up during the summertime. Where was that?

A. Well, he plowed up some of this area in here, about, I think, 60 acres. That was planted to alfalfa.

Q. That is up on the end of the dobe ground?

A. That is in the dobe ground here, yes. And then I think he plowed another strip along in here, and then down in here he plowed some more ground.

Q. Did you observe whether at the time that was plowed there was much of a crop there?

A. Well, I wasn't out in here. But there wasn't much of a crop here. And this here would have made a lot of pasture. There was a pretty good lot of feed there.

Q. That was in alfalfa, you say?

A. Yes. I don't think Clay planted that area there. I don't think he planted it to grain at all, because it was in the alfalfa. He could have planted it.

(Testimony of James C. Stevenson.)

Q. So there was no loss in grain production by reason of that part up in the dobe ground?

A. Not this up here. But I don't know if he even planted that to grain. I wasn't even up in that section there. I don't know if he even planted it to grain.

Q. So that part you are speaking of up in the north end, you can't say whether there was any loss in production by reason of the fact—— [38]

A. No, I wouldn't say, because I was never up there.

Q. The only part, then, is down in the weed patch there? He plowed up some of that?

A. Yes. The reason I know about these places, see, this pasture land up in here is where my cattle was, and I could see this—I was a little more familiar with it. And along this part here, I didn't go in there. My hired man took care of the cattle out in there, and I didn't go out only maybe once or twice a year.

Q. This area that he plowed up down in the weed patch, there wasn't any crop there to speak of, anyway, was there?

A. No, there wasn't. It was very thin.

Q. So the mere fact he plowed it up didn't lose any grain production?

A. No, there wouldn't have been anything there anyway. He called it, like they do up in his country, summer fallow. He wanted to summer-fallow it and get ready for another year and get the weeds out of it.

(Testimony of James C. Stevenson.)

Q. So as a farmer you would have no criticism of his plowing up that area that had already gone to weeds, would you?

A. No, I wouldn't.

Mr. Kester: I think that is all.

Redirect Examination

By Mr. Tonkoff:

Q. Mr. Stevenson, what is the elevation of the water in the lake as compared to the terrain there on the farm property? Is it above the ground? [39]

A. The elevation of—

Q. Of the water. Is the water above the ground?

A. The lake?

Q. Is it higher than the farming property? Is the water diked up and is the water higher than the ground to the west there where you cultivate?

A. This water up in here is higher than that, yes.

Q. How did you put it in the lake?

A. You pump it in.

Q. When you want to irrigate, would you tell the Court how you would irrigate.

A. Right over here we have a lot of—we have three big pumps there, and we just open them headgates and let this water come back through this big canal here over to about right about here (indicating on map). Then there is another canal runs right down along there. We have a big 12-inch pump right here at the end of this ditch, and then there is—we lift this water up here, and it comes up to about this point. Then there is a

(Testimony of James C. Stevenson.)

big high fill there where the water can run up pretty near to this fence line here. Then you take the water whatever way you want to.

Q. When you want to stop irrigating what do you do? A. What? [40]

Q. When you want to stop irrigating, how do you shut the water off?

A. Just shut your pumps down.

Q. You shut it off so it won't come in from the lake, too, don't you?

A. Oh, you go out there and shut them—we have those flap valves on those big pumps, and you just close them down and that stops the water from coming back into the ditch, the big drain ditch. You see, we just turn as much water as we want into these drain ditches, and then start the pumps up and keep it pumped out.

Q. So you use those canals both for draining and irrigation?

A. That is right. You can use it either way.

Q. Are there canals all over the ranch so that you can drain it or irrigate it? A. Oh, yes.

Q. How many pumps do you have there, Mr. Stevenson? A. To pump out of the lake?

Q. Yes, and into the lake.

A. There is three big pumps over here, and down in here there is another 12-inch pump to pump out of the lake, for the land.

Q. How much water are those pumps capable of pumping per minute, do you remember?

A. I never figured that out. I think this 12-

(Testimony of James C. Stevenson.)

inch pump will pump about five second-feet or maybe more, and then those big sump pumps—I don't know how much they pump. They are 22-inch pumps, two of them is.

Q. Is that water in the lake fit for irrigation any time in the summer?

A. Up until the 1st of July it is good enough to irrigate with, yes.

Q. Was there any alkali in that water?

A. There is alkali in the water every year, but it picks up alkali after the big runoff.

Q. Do you irrigate after the middle of July?

A. No. Along the first part of July we irrigate, and that is all we have to irrigate.

Q. Would you tell the Court when does your harvesting season start, Mr. Stevenson?

A. We always start around the 20th of August.

Q. The 20th of August? A. Yes.

Q. Do you remember what time of the season Mr. Barr started harvesting in the 1953, what time of the year, rather?

A. I would say it was in September, around the middle of September, along in there sometime.

Q. If you don't harvest when the wheat is ready is there any danger of losing some of it from geese and ducks down there? [42]

A. Yes, there is.

Q. Did the geese and the ducks get a part of this crop in 1953? A. Yes, they did.

Q. Could you estimate about what portion of the crop they took?

(Testimony of James C. Stevenson.)

A. No, I couldn't. I couldn't answer that.

Q. When do the geese and ducks migrate in that area, Mr. Stevenson?

A. They start coming in in August, the ducks come in.

Q. Are there many of them?

A. Many of them?

Q. Yes. A. Millions of them.

Q. They are a hazard to the crops, are they, at that time of the year? A. Yes.

Q. Would you show the Court where the rye, barley, oats and grain were planted and the acreage, if you remember.

A. That Mr. Barr had?

Q. Yes, the year that Mr. Barr farmed it.

A. Well, I don't remember just—I know there was about 200 acres of potatoes down in this section. And this was all barley. I think he had oats back up in here. I don't know if he had—did you have wheat up in there, Clay? I think he had wheat up in that dobe ground. I don't remember just exactly where it was. I think he had a patch of wheat up in here someplace in one of these fields, but I don't know which one.

Q. Now, where the property was plowed up how bad were the weeds? In other words, had the weeds injured the crops?

The Court: Ten minutes recess.

(Short recess.)

Mr. Tonkoff: Q. Mr. Stevenson, could you state why the crops were plowed where Mr. Barr

(Testimony of James C. Stevenson.)

plowed them in 1953? In other words, were they weedy? A. What was it?

Q. Were the crops weedy where the ground was plowed?

A. I don't think they was. The grain was so thin they just plowed it up, the way it looked to me.

Q. Had it been planted to grain?

A. Yes, most of it.

Q. Do you know why it was plowed?

A. I can show you this section up in here. I don't think he planted that at all. But he did plow a long strip—I don't think he planted that, but down in here it had been planted to grain. I don't know if it come up or it was awful thin. He said he was going to summer-fallow it.

Q. About how many acres were planted to grain in 1953? By grain I mean barley, wheat, rye and oats. [44]

A. Oh, there was 200 acres up here, and then I don't know how much he left out here that he didn't plant. There must have been 2500 acres, anyway.

Q. How many?

A. There must have been 2500 acres.

Mr. Tonkoff: I see. That is all.

Recross Examination

By Mr. Kester:

Q. Mr. Stevenson, referring again to the water up on the dove ground on the west end there, you

(Testimony of James C. Stevenson.)

never got any water up on the extreme west end of that, did you?

A. Yes, sir. There is a well right there we used to have. We put a pump in it and irrigated. Then when we was irrigating this pasture land we used to let—there was a ditch across there, and we used to let the water come across the pasture land and then onto this land.

Q. You spoke about a pump down in the main ditch across the lake bottom there and pumping water up onto the dobe ground. Now the pipe line to take that up only went about a third of the way up there, didn't it?

A. The pipe line went about a third of the way, and then there was a fill built up.

Q. There wasn't any pipe or ditch on that fill, was there, when you were there? [45]

A. Not when we was there. We was just building that.

Q. You never got to use that for irrigation purposes while you were there, did you?

A. Not the fill. We did the pipe line up to the fill.

Q. Yes, but that only came up to about a third of that dobe ground, didn't it?

A. Well, if you go a third of the way across here, you could then, yes. The ditches ran back around this way, and you could get most of it and then irrigate this other from these creeks and this little pump up there. That is the way we did it. We

(Testimony of James C. Stevenson.)

irrigated practically all of it. But you couldn't irrigate all of it from this big pump down there, no. You couldn't do it.

Q. I see. You mentioned about your harvest usually started about the 20th of August. Is that right?

A. That is right, our early grain. We start planting our grain early, and the first grain that we planted would be ripe quicker and we would start on that.

Q. So in order to get to harvesting by the 20th of August you would have to have it planted by the middle of April, wouldn't you?

A. No, about the 1st of May. You take 90 days, you have barley and oats.

Q. Doesn't it take more than that for barley?

A. No. [46]

Q. You usually had your planting done by the 1st of May; is that right?

A. No, no, not every year. We planted up to the 1st of June. The last year I was there the dike broke over here and this land all got wet, and we planted that into oats up until the 1st of July and made three tons to the acre on oats after that.

Q. You can't harvest it before it is ripe, can you?

A. No, you can't harvest it for grain, no. That is right.

Q. If it isn't ripe by August 20th you just have to wait, don't you?

(Testimony of James C. Stevenson.)

A. That is right. But we generally start—we wouldn't start all the rigs by the 20th of August. We would start a couple, and then every few days we would put on another rig.

Mr. Kester: That is all.

Redirect Examination

By Mr. Tonkoff:

Q. Is that dobe land capable of producing as much as the other land, Mr. Stevenson, if it is properly farmed?

A. Yes, it will if you farm it right and get plenty of water on it.

Mr. Tonkoff: That is all. [47]

Recross Examination

By Mr. Kester:

Q. That year that you planted up to July, you cut that off for hay, didn't you? That didn't thresh grain?

A. Well, that is the year that I sold the ranch and my boy—Mr. Hofues had him cut that for hay, yes.

Q. So you didn't make any grain on that?

A. No, but it would grow in a short length of time. That is the point I was showing you.

Q. But it didn't ripen? A. Oh, no.

Mr. Kester: That is all.

(Witness excused.) [48]

JAMES C. STEVENSON, Jr.

was produced as a witness in behalf of the Plaintiff and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Tonkoff:

Q. Mr. Stevenson, the Mr. Stevenson that was on the stand is your father?

A. That is right.

Q. Where do you live?

A. I live in Dorris, California.

Q. How far is that from the ranch we have been talking about?

A. Oh, about 11 or 12 miles.

Q. How long have you lived in that area?

A. I moved over there in 1945, in the spring, early spring.

Q. What has been your occupation during your life?

A. I have been a farmer all my life.

Q. What kind of farming were you doing?

A. Well, principally grain and livestock, some potatoes.

Q. Did you ever manage this ranch, the Meiss Ranch?

A. I was foreman on it for my father from 1945 until 1948, the fall of 1948, and I was gone one year and then come back.

Q. When did you finally leave?

A. I was there after Mr. Hofues bought it, and

(Testimony of James C. Stevenson, Jr.)

I worked 18 months for him, or approximately that.

Q. When did Mr. Hofues and Mr. Kirschmer purchase the property? [49]

A. In August of 1952.

Q. I forgot to ask you about how many acres is in that ranch?

A. There is 13,160.

Q. How much of it is tillable land?

A. You mean at present, right now?

Q. In '53.

A. Well, there was approximately 3500 acres that was farmed in grain, and then there was three or four hundred acres that my sister had rented over on the other side that was tillable.

Q. What was your sister's name?

A. Mrs. Noakes.

Q. Would you point out on that map—I think that is Exhibit 2—where her property was or where she was farming?

A. Well, it is right over in this area here, half of Section 6.

Q. How many acres was she farming there?

A. In '53 she had about 800 acres, I think.

Q. Did you observe the crops on her property in 1953?

A. I was over there a number of times.

Q. Is it necessary to irrigate crops in that area.

A. It certainly is.

Q. Before you go any further, would you briefly describe what development was made of that

(Testimony of James C. Stevenson, Jr.)

ranch up to 1953 where the lake is and what you did. [50]

A. Well, when my father bought the ranch all this area in here was a big lake, and tules and things. We went in and built a dike—that is not a very good map—maybe I can find the dike. Oh, yes. Here it is. We built a dike right across here and put some pumps in to pump this water out up into this higher area, and then we broke up the tules, plowed and burned them up, and put numerous drain ditches all through there so we could keep the water down below a certain level on the ground.

Q. What is the elevation of the area where the water is pumped in as to the land west of it or where the farm property is?

A. You mean where they pumped water over in this lake here?

Q. Yes.

A. Oh, it is approximately 4250, or something like that.

Q. What is that?

A. That is approximately 4250 feet elevation.

Q. Is the water above the top of the ground to the west there?

A. It is several feet, yes; about 7 or 8, or something like that.

Q. How high is that dike?

A. Oh, it is approximately 8 feet high, I believe.

(Testimony of James C. Stevenson, Jr.)

Q. Would you show his Honor where the canals are on that property. [51]

A. Well, there is a canal goes right across here up on this side, right straight across the middle. That is where the pumps are on that end and on this end. And there is one right here, and a big pump right there, and there is one up above about there, and then one right along this fence line, one across this way, and there is one runs up to this line and one runs right across there. There is a drain canal right up alongside of here. I believe it ends right about here (indicating on map).

Q. What do you use those canals for, Mr. Stevenson?

A. Well, in the spring of the year when the snow and ice melts off of these high mountains back here, and the rain comes, it runs down on this area here, and we used to have to drain the water off. We would pump this water over into this lake, and we used it for drainage. Then in the summer time we would use them to irrigate with, too.

Q. How did you use those to irrigate with? Will you just explain the mechanics of it.

A. Well, we put some headgates right in over here for these pumps, and then we would let the water back through the pumps. And right down ahead of this ditch here is another pump, so we could turn water into this ditch here and bring it right down to this pump and pump the water back into the high-line ditch that we had up around

(Testimony of James C. Stevenson, Jr.)

here and irrigate this area. This pump over here pumped back up—there was a pipe line led there, and then a fill built, and we could irrigate all this area here, all the pasture and everything. And a well right up in this corner here that supplemented a little higher area along here that you couldn't get from this pump. These three creeks in here ran down across the meadows, and there was a ditch there that you could take that water and scatter it along anywhere you wanted it. You could irrigate that. Then over in here was a big flat area, and we could pump water into there and up in here we had a cut through, a little ditch right around this area here, and right back here. You see, the lowest part of the property is right square in the center of this. It sloped this way and sloped this way, so it kept the water out of the higher edges where it ran down. Your drainage ditches, then, is in the center down here, and these pumps in the center of it pumped out so it wouldn't get too wet in there.

Q. What is the capacity of those pumps when they are all pumping?

A. Well, the way I had it figured, with all the wells and these irrigation and drainage pumps, they would pump about 100 second-feet.

Q. How much is that in gallons, Mr. Stevenson?

A. I think it is approximately 450 gallons to make one second-foot.

Q. Per minute? A. Yes. [53]

Q. How long does it take to irrigate that prop-

(Testimony of James C. Stevenson, Jr.)

erty when you operate the pumps at full capacity?

A. Well, it wouldn't really take so long if you had crew enough to handle it, but you have to irrigate it according to when the grain is big enough to stand it. And we would start to irrigate along—some grain would be planted early and some later. You start on the early grain and work right through on the older grain.

Q. What kind of land is that in the area where they were farming there?

A. Well, I think we have a map here of the classification that says this general area in here is class 1 land, this Class 2, and Class 3 along up in this meadow, and this is dobe land. There is some very poor land over here under the lake. I don't know just exactly what the classification is. Then there is brush land, which is classified as No. 4 land, just wet land. It needs drainage in it.

Q. Were you operating the ranch or managing the ranch in June of 1953? A. I was.

Q. And particularly on about the 10th of June would you tell us what the condition of the crops was.

A. They was in pretty fair shape. All the crops were planted by then, and they was in—I would say in good shape, because we had quite a lot of moisture, rain, which helped. [54]

Q. How much had they grown?

A. Well, the early grain probably was five or six inches high, and the older grain was just barely

(Testimony of James C. Stevenson, Jr.)
beginning to come through. The last grain, they had only been through planting a few days.

Q. When Mr. Hofues took that over, did they employ you?

A. Yes, I took over the managership the day that they took over from my father, August 7th, I believe it was, 1952.

Q. You continued to work on through 1953?

A. That is right, to January.

Q. When did Mr. Barr come to the Meiss Ranch?

A. Mr. Barr leased this farm and took possession May 8th.

Q. At that time how many acres were planted?

A. Oh, just a rough estimate, around 1200 acres in this lower end here planted.

Q. What were the total plantings that he made? Do you have something there——

A. Yes, he had a map for us when I was the manager of the ranch there that I made an estimate off of. I don't know where the map has disappeared to. But I had figured he had about 250 acres of rye, about 1200 acres of barley, 132 acres of wheat, and around 1,085 or 1,086 acres of oats.

Q. Now, when did you notice any change in the condition of these crops?

A. Well, when he got his crops planted he left. He didn't show up around there very much until harvest time. Once or twice is all he showed up.

Q. Do you recollect when Mr. Welch and myself and Mr. Barr came to the ranch?

(Testimony of James C. Stevenson, Jr.)

A. Yes. That was approximately the 1st of July.

Q. At that time what was the condition of the soil where the crops were?

A. The soil and the crops on this higher ground was awfully dry, and the soil was cracked open pretty much.

Q. Was anything said in your presence to Mr. Barr about irrigating?

A. Yes, they asked him if he would irrigate.

Q. What is that?

A. The fellows asked him if he would irrigate, and he said he would have a crew down there the next Monday, or something on that order.

Q. Did he bring a crew there the following Monday?

A. He never showed up for about three weeks.

Q. At the time he showed up what were you trying to do?

A. I was trying to irrigate along this upper edge here. I called Mr. Hofues and Mr. Kirschmer, and Mr. Kirschmer finally said, "Well, why don't you irrigate what you can?" I said, "All right, I will." So I was trying to irrigate some along the upper edge here in this worst stuff.

Q. What did Mr. Barr order you to do when he arrived there? [56]

A. He told me he didn't want any more water on it.

Q. At the time he told you he didn't want any

(Testimony of James C. Stevenson, Jr.)

more water on it would you describe what the condition of the crops was then.

A. They was very badly in need of water all over on the higher edges. If he had irrigated them, it would have built the water table up a little more down in the center part there, and probably would have made a better crop of grain down in there, even.

Q. Aside from the grain crops were there any other crops growing there?

A. Yes, here was two fellows had 100 acres apiece of potatoes right down in this corner here.

Q. Was there ample water during the entire summer to irrigate those crops?

A. Yes, there was.

Q. Would you tell us what you used the wells for, Mr. Stevenson.

A. Well, the wells was used to irrigate the meadows and potatoes and grain. And then, of course, we used the lake—we always used the lake water first, and then these wells was for later in the season when the creeks and things got low.

Q. Could you also use the wells for drainage?

A. Yes. In 1953 I drilled a couple of test wells, drain wells, over on this big canal over here, and put water down them, and the engineer measured one of them for me and he said it was running 3950 gallons per minute down. [57]

Q. You could pour in as much water as you could take out of them? You could use them either

(Testimony of James C. Stevenson, Jr.)

for pumping for irrigation or use them for drainage? A. That is right.

Q. Now what was the condition of the crops as far as weeds was concerned, Mr. Stevenson?

A. Oh, we had quite a little weedy area on the southeast side there; approximately 300 acres, or something like that.

Q. In what kind of crops?

A. Well, there was rye and then there was a small strip here of about 70 acres of some imported barley that my father had acquired. He was trying to test that there and grow it there. He had about 70 acres of it right along in there.

Q. What was the extent of the weeds? Had they choked out the crops entirely?

A. Well, as the season goes along, why, the weeds get larger and they will choke out the crop.

Q. Did they in this instance annihilate the crops?

A. Oh, yes. They took practically all of it.

Q. Did Mr. Barr plow any of the crops that year?

A. Yes, he plowed, oh, approximately 100 acres right in here, plowed the crop up. Then he plowed some up in this top field, and then he plowed some along the back side here. Some of it he didn't even plant. Then he plowed up over here along the back side there. [58]

Q. What was the condition of the crops where he plowed?

A. Well, this one area was weedy, and this area

(Testimony of James C. Stevenson, Jr.)

up in here was burned up, dry, got about three or four inches high and practically burned up. This area in here had some alfalfa and some wild oats and stuff in it. He plowed that up.

Q. Now, when the weeds come up what is the customary thing to do?

A. As a general thing in that country and area down there everybody sprays them when the grain is very small and the weeds begin to show, they spray it and kill the weeds.

Q. What time of year do you usually spray it?

A. Oh, most generally in the latter part of June or the first week or so of July.

Q. Did Mr. Barr do any spraying there?

A. He sprayed just a little on the ditch bank, is all I ever saw.

Q. Will you point out on the map what area he sprayed?

A. It was this first ditch bank that went across here, and he sprayed just a little ways down this way, this ditch right here.

Q. How much of the ditch bank did he cover?

A. Oh, he just made one pass right across this way with an airplane. And I think they figure about 60 feet they make to a swath with an airplane.

Q. What portion needed spraying that was not sprayed, how many acres?

A. There was probably about 300 acres right in here.

Q. Was that 300 acres ever harvested?

(Testimony of James C. Stevenson, Jr.)

A. Just spots of it.

Q. Now, could you grow crops on that ranch in that immediate vicinity without irrigation?

A. Well, you can grow a dry land crop, but it doesn't amount to very much in that country.

Q. How high do the crops grow, from your observation in previous years?

A. Well, normal crops run waist to shoulder-high.

Q. This particular year in comparison what was the condition of your sister's crops that were on the part of the ranch there that she had?

A. I believe in this year she had a patch of irrigated wheat there. You see, only part of this was irrigated. There was a well in that corner, and about 105 or 110 acres was leveled up, and then she had this dry land wheat here. It didn't amount to very much. And she had some wheat in here and some potatoes. The wheat and potatoes was fair. And then they had some barley back in here. Then the rest of their ground was alfalfa and clover and potatoes.

Q. What kind of production did she get, do you know? [60]

A. I don't know exactly, but I would presume somewhere around 2500 or 3000 pounds per acre on the wheat and barley.

Q. Can you approximate from your experience in farming that property about what the production is per acre in pounds for barley, wheat, rye and oats?

(Testimony of James C. Stevenson, Jr.)

A. Well, on this good irrigated ground over here it runs about 3000 pounds of barley per acre, and approximately the same for oats. Your rye will run about twelve to fifteen hundred pounds, and your wheat will run around 2500 pounds per acre.

Q. When was the harvesting season beginning in 1953?

A. Oh, I think most everybody else started around the 20th of August.

Q. When did Mr. Barr start harvesting?

A. Well, somewhere between the 10th and the 15th of September.

Q. Between the time this harvesting started and the time that he started to harvest was there any loss occasioned by ducks and geese?

A. Oh, yes. The ducks and geese come in from the north along the middle of August——

Mr. Kester: Pardon me, your Honor. I don't like to interrupt. We haven't been objecting and ordinarily would not, but there is no allegation in this case of any loss by reason of ducks and geese. I mention it only so that it won't be thrown up later that I failed to object when the evidence was offered. It is wholly irrelevant to the case. [61]

The Court: Objection overruled.

Mr. Tonkoff: Go ahead.

A. There was quite a lot of ducks and geese come in along the middle part of August. I spent most of my evenings herding ducks and geese out of these drain ditches, because they would go right in them and then work back up.

(Testimony of James C. Stevenson, Jr.)

Q. Did they get part of the crop in spite of your efforts? A. Beg pardon?

Q. Did they get part of the crop in spite of your attempts to keep them out?

A. I still don't understand.

Q. Did the ducks and the geese take part of the crop in spite of your efforts?

A. Yes; they took strips all along, yes, south of these drain ditches.

Q. About how many acres would you estimate was lost by reason of ducks and geese?

A. It would be hard really to estimate it. There is about eight miles of drain ditches. Some places they would work back two or three hundred feet, and some places further. Probably 60 or 70 acres.

Q. Would you describe how the grain was harvested?

A. Well, I would say it wasn't harvested in a very good——

Q. Tell us how it was done, Mr. Stevenson. [62]

A. They moved along too fast with their machines, and that light a stand of grain they had pickup reels on where they couldn't get the grain back in there, and in the course of that they would run over the top of a lot of it and leave it there. And crowding these machines too heavy put a lot over the rear end of the machines.

Q. How many machines were used in harvesting? A. There was six.

Q. Who was operating them?

A. Oh, Barr's hired men.

Q. What? A. Mr. Barr's hired men.

(Testimony of James C. Stevenson, Jr.)

Q. How old were they?

A. There was some young boys there, mostly. I think his father-in-law was running one machine, and most of them was young fellows.

Q. How old were they?

A. 19 and 20; something like that age group.

Q. Was there any wheat or grain left on the ground after it was harvested?

A. Yes, there was quite a little that wasn't cut, and quite a little that went through the machines that they didn't save.

Q. Can you approximate about how many pounds per acre were not harvested or were harvested in such a manner that the grain was left in the fields? [63]

A. Oh, I could probably say five or six hundred pounds per acre.

Q. How was the wheat hauled to market?

A. Well, it was hauled in the ranch trucks and things there.

Q. What is the proper and customary manner in hauling it to market?

A. We always hauled it in trucks to wherever they loaded it to market, and not try to overload the trucks so it would run all over and scatter down the road.

Q. Did you use tarps?

A. Sometimes. Sometimes we just didn't fill the trucks quite so full.

Q. Where was the wheat hauled, Mr. Stevenson?

A. Part of it was loaded to the railroad at

(Testimony of James C. Stevenson, Jr.)

Macdoel, and I think there was some taken to the elevator or the warehouse over to Merrill.

Q. How far is this ranch from the main traveled highway there?

A. I counted up here on sections. About five and a half miles out to the ranchhouse.

Q. From the ranch to the main traveled road was there any wheat or grain on the road?

A. Oh, there was quite an excessive amount.

Q. Can you describe it a little more definitely?

A. Well, from where they loaded the grain out of these buildings until you get out a ways it covered the road an inch or so deep, and then after you got farther out, why, it got lighter all the time.

Q. How many times, on how many occasions, was Mr. Barr down there from the time he took over the ranch until it was harvested?

A. Well, he was there quite a little bit, a week or two weeks, something like that, in the spring when he put the crop in. And he was there, I would say, about three times on the ranch during the summer, the growing season. And then he was there a part of the time during harvesting.

Q. When was the wheat first ready to be harvested?

A. There was some of the wheat that you could start, probably about the 15th or 20th of August. They didn't start until later, but it could have been harvested earlier.

Q. Was all the other grain ready to be harvested at that time?

(Testimony of James C. Stevenson, Jr.)

A. No, not all of it, but there was some that you could start on to work and harvest that part that was ready, and gradually work right on to the other as it got ready.

Q. Would you describe the condition of the soil at harvesttime as to dryness?

A. Well, in all this west side over here, on this heavier land, it was all cracked—the ground was all badly cracked. There wasn't much grain on it, because it hadn't had any [65] water. And the lower part down in here should have had a little more sub up from the bottom.

Q. Were you present during the harvest season, or just before the harvest season, when moving pictures were taken of the crop?

A. Yes. I was.

Q. Would you just describe over what portions moving pictures were taken of the ranch?

A. Well, the center road goes in right from the center here, and we went in there—this patch of potatoes was along here, and we went along the edge of the potatoes. And they started taking shots all up along this side here, up in the wheat. He had a little patch of wheat, 70 acres, up in this corner here, and this was oats. He took pictures down along this center dike, and out to here, and back into the potatoes and the grain. I think that was about the general area; just made kind of a general circle all around to get an equal picture of all of it.

(Testimony of James C. Stevenson, Jr.)

Mr. Tonkoff: Your Honor, this afternoon may we run these pictures?

The Court: I want to get some of these witnesses out of the way.

Mr. Tonkoff: Q. Did you ever mention to Mr. Barr about the dryness or lack of water on this property?

A. Oh, yes. I told him before we got done planting grain and things that he would have to irrigate a lot of that grain, and when he got ready I would show him where to make his ditches. We make little, small ditches, and use them to run a little water out over the top of the ground and sub it up. I told him I would show him where to make those, and one thing and another, and help him. I had arrangements made for a big ditcher from the irrigation district to use.

Q. Do you know the market price of barley, rye, wheat and oats in 1953?

A. I know what the grain on the ranch was sold at.

Q. You had an interest in that crop?

A. That is right. I had a percentage.

Q. What did barley bring in 1953?

A. \$3.10 a hundred.

Q. What did rye bring?

A. \$1.90 a hundred.

Q. That is a hundredweight?

A. That is a hundredweight.

Q. What did wheat bring?

(Testimony of James C. Stevenson, Jr.)

A. I have part of the contracts right here. I could read them off of that, I guess.

Q. You have part of the contracts?

A. Yes.

Q. Under which the grain was sold?

A. Yes. I don't have the contract for the barley, but I have the wheat and oats right here. Let's see. Wheat, \$3.15 per hundred. [67]

Q. What?

A. \$3.15 per hundred. Oats was \$2.30 per hundred.

Q. In your opinion as a grain farmer, and having farmed there most of your life, would you say this property was farmed in a good and farmer-like manner?

A. I would say it was very poor according to the customs of the country.

Mr. Tonkoff: That is all.

Cross Examination

By Mr. Kester:

Q. May I see this contract that you were referring to? A. Certainly.

Q. This copy of contract refers to wheat at \$3.15 and oats at \$2.30; is that right?

A. That is right.

Q. It doesn't mention the barley?

A. Well, no. I have lost the other part of it somewhere. I had the barley contract, but I couldn't find it.

(Testimony of James C. Stevenson, Jr.)

Mr. Kester: May we have this marked and kept here?

(The contract referred to was thereupon marked as Defendants' Exhibit 4 for Identification.)

Mr. Kester: Q. As a matter of fact, the \$3.10 price that you mentioned for barley was for brewing barley, wasn't it? A. That is right.

Q. For feed barley it was considerably less, wasn't it?

A. I believe it was \$2.85. I am not sure.

Q. Wasn't it \$2.35 for feed or grade barley?

A. I couldn't be sure what it was. I can't remember. I know all the barley off the ranch went as brewing barley that year.

Q. You say all the barley went as brewing barley?

A. That is what Mr. Kirschmer told me, that every bit of it went into brewing barley.

Q. You don't know, then, about the various discounts that were made from the three-dollar price that you mentioned?

A. Well, it is marked on the contract it would be according to the scale and discount.

Q. Did you participate in the settlement for the crop?

A. No, I was gone from the ranch before that crop was finished.

Q. You signed the original contract which you have produced there, you signed that on behalf

(Testimony of James C. Stevenson, Jr.)
of Hofues and Kirschmer, didn't you, for your half? A. That is right.

Q. And Mr. Welch signed that on behalf of Tonkoff and Herman for their half-interest? [69]

A. That is right.

Q. You had worked for Hofues and Kirschmer in the fall of 1952, had you?

A. That is right.

Q. They bought the place about harvesttime in 1952?

A. I believe it was August 7th that we took possession for Hofues and Kirschmer.

Q. That was before harvest, then?

A. Yes.

Q. In 1952? A. That is right.

Q. Then did you work there during harvest?

A. Yes, I managed the ranch from August 7th until—I left on October 11th of 1953.

Q. You made a new arrangement with Hofues and Kirschmer starting with the first of 1953, did you not?

A. I made an arrangement—I have that arrangement right here. I made it in March, I believe it was.

Q. In March of 1953?

A. I believe that is when it is. I will look the date up to be sure. March 12th, 1953.

Q. Is that a written contract that you had with Hofues and Kirschmer?

A. Written agreement, yes.

Q. Could we have a look at it? [70]

(Testimony of James C. Stevenson, Jr.)

A. Certainly. (Handing document to counsel.)

Q. Under this agreement you were to get \$500 per month and expenses plus 5 per cent of the net profit of the crops and the pasture, after deducting all operating expenses, plus an additional sum if the property was sold. Is that correct?

A. That is right.

Mr. Kester: May we have that marked, please?

(The document above referred to was thereupon marked Defendants' Exhibit 5 for Identification.)

Mr. Kester: Q. So that you had an interest in the crop yourself to the extent of 5 per cent of the net profit; is that right?

A. That is the interest I had in it.

Q. And you anticipated when you entered into that staying on with the owners indefinitely, did you not?

A. That was the agreement, unless they sold the ranch, and then he said he would recommend me to go on with the other people if they preferred it.

Q. Now in May of 1953 Mr. Barr arrived and then you learned that he had a lease on the ranch for 50 per cent of the crop, did you not?

A. That is the understanding I had. I never did get to see the lease. He wouldn't produce it.

Q. You were advised by the owners, however, that he had the [71] lease? A. Yes.

Q. What arrangement was made as far as you were concerned during Mr. Barr's lease?

A. There was no change of the arrangement at

(Testimony of James C. Stevenson, Jr.)

all. I was to manage the place, and Mr. Barr would farm his part just the same as the other lessors did their part.

Q. You say he farmed his part. What part do you mean?

A. He had the grain part of it. The potato men had their part leased, and Mr. Stevenson, my father, had the pasture all leased, the meadows.

Q. What was your function, then?

A. I was to see that everybody got along and got their part of the water, checked all the crops that was harvested off of there, and have a record of the sale of the crops and do some developing work at the same time.

Q. You regarded yourself as still the manager of the place, did you?

A. That is what my agreement says.

Q. The agreement with the owners?

A. Yes.

Q. You spoke about seeing that everybody got water. Was it your understanding that the potato growers had priority on the water?

A. They had preference to the water. [72]

Q. And your father's pasture also had prior rights to the water over the grain land?

A. I never understood that. Everybody had their equal share of water when they needed it, only for the potato men. They got preference on the water, because they had to irrigate at a certain time. They couldn't wait two or three days to irrigate their crops.

(Testimony of James C. Stevenson, Jr.)

Q. You had started the planting yourself in the spring of 1953, had you not? A. Yes.

Q. How much did you get planted yourself?

A. Oh, approximately 1200 acres.

Q. Could you indicate on the map where that was?

A. I think on the lower part, along the back of it. The potatoes was right along in here (indicating), and most of the lower part.

Q. The southeastern part?

A. It was on the southeastern part of the farm here, you might say.

Q. The southern part?

A. There was a little bit right up in here that wasn't quite done when Mr. Barr took it over.

Q. Had you planted any of the dobe ground on the west end?

A. I think I planted about one per cent there with a little wheat, which just got started there when Mr. Barr took over. [73]

Q. How much did you plant up in that end?

A. Oh, I couldn't tell you for sure. Maybe 10 or 15 acres when he moved up in there. He just moved up in the evening.

Q. You say you only had 10 or 15 acres planted there?

A. As near as I can remember, yes.

Q. You gave some figures on the acreage that you say had been planted to various grains. Where did you get those figures?

(Testimony of James C. Stevenson, Jr.)

A. I got them off of a map that Mr. Kirschmer has at the present time.

Q. Is that the map that is on the lower end of the blackboard there?

A. No, I don't think so.

Q. Will you look at that map, please.

A. Yes, I have already looked at it.

Q. Do you recognize ever having seen that map before?

A. No, I don't think so. I don't think I ever saw that map before, or anything like it.

Q. Now, as I recall, you testified that Mr. Tonkoff was down there about the 1st of July; is that correct?

A. Approximately, yes.

Q. And you said you had a conversation there and that Mr. Tonkoff asked Mr. Barr about irrigating. That was about the 1st of July, wasn't it?

A. Yes.

Q. And, if I remember correctly, you said then that Mr. Barr [74] was gone for three weeks; is that right?

A. It was three weeks after that before he ever come back on the place that I ever saw.

Q. That would make it about the 21st or 22nd of July?

A. Somewhere in that neighborhood, yes.

Q. It was at that time that he told you he didn't want any more water?

A. That is right.

Q. Is it your testimony that the grain was ready to harvest in the middle of August, 1953?

(Testimony of James C. Stevenson, Jr.)

A. Some of it was ready on the 20th, the 15th or 20th of August, to start on.

Q. Don't you recall that everybody was standing around waiting for the grain to ripen so that they could start harvesting and it was not ready?

A. Yes, I was waiting for all of it to harvest, and there was some ready before the 20th.

Q. Do you recall that some was cut too early and had to be laid out to dry before it could be shipped?

A. Well, that is kind of customary in that country. You hit green spots that you have green grain. Every once in a while you get that.

Q. You recall that did happen in 1953?

A. Yes. I think mostly all the trouble with drying was over in these weeds.

Q. You don't recall any of the first cuttings that had to [75] be stored because it wasn't dry enough to ship?

A. No.

Q. You spoke about tarps on the trucks. As a matter of fact, there were no tarps as a part of the ranch equipment there, were there?

A. I think there was tarps there, yes.

Q. You think there was?

A. Yes.

Q. Who took these movies that you spoke of?

A. Mr. Tonkoff.

Q. Did you have anything to do with the taking of them?

A. No, I just stood around and watched where he took them, stayed out in the field.

Mr. Kester: I think that is all.

(Testimony of James C. Stevenson, Jr.)

Redirect Examination

By Mr. Tonkoff:

Q. Have you seen those movies since they were taken, Mr. Stevenson?

A. I saw them last night for the first time.

Q. Do they represent the condition of the ground and the cracks that are disclosed in these movies adequately and properly?

A. Yes, I think they do.

Q. Incidentally, how wide were those cracks?

A. Oh, they averaged all the way from an inch to three or four inches.

Q. How long would they be?

A. Oh, some places they would be 20 or 30 feet long.

Q. What was the condition of the soil at that place?

A. It was very dry; extremely dry.

Q. And the condition of the grain?

A. There practically wasn't any.

Q. How high was the grain in those dry spots, Mr. Stevenson?

A. Oh, probably halfway to your knees.

Q. Do those movies reflect that?

A. I think they do.

Q. How high was the grain where there was water along the ditch bank?

A. Waist-high, approximately.

Q. Where was the dobe soil on that ranch, Mr. Stevenson?

A. It was this little area up in here, and some

(Testimony of James C. Stevenson, Jr.)

little area down along the lake, and a little dobe where it runs up the hill. It is not regular; just irregular along.

Q. What was the production on that portion of the ranch in comparison to the other if the soil was properly cared for and cultivated?

A. I didn't get that.

Q. Was there any difference in production on the dobe land and the other land if it was properly cared for? [77]

A. There was practically no crop on this up along here this year.

Q. If it was properly irrigated and cultivated, would it have produced as much as the other part of the ranch?

A. Well, approximately, yes.

Q. Now, what is the difference between that feed barley and brewing barley?

A. Brewing barley has to weigh 50 pounds to the bushel and it has to be of a different type. It is a two-row principally in that country. Hannehen barley is the name of it.

Q. Does irrigation have anything to do with whether it becomes brewing barley or feed barley?

A. Not necessarily.

Q. What causes the difference in weight?

A. Well, it could be frosted a little bit, and not get enough moisture and shrivel it. Heat could do it.

Q. What did it this particular year?

A. Beg pardon?

Q. If some of this barley didn't go as brewing

(Testimony of James C. Stevenson, Jr.)

barley, what would make it go as feed barley?

A. I would think it was short of moisture.

Q. Is that fresh water in that lake?

A. It is all snow water, comes off of these mountains.

Q. Are there any fish in that lake? [78]

A. Yes.

Q. Will fish survive in alkaline water, where there is alkali in the water?

A. I wouldn't think very long, and especially those fresh water shrimp that are in there in the spring and summer.

Q. Does that lake ever dry up?

A. Yes, it dries up. Well, this year it is dry now. It dried up along the first part of August.

Mr. Tonkoff: I think that is all, your Honor, except if you would allow us to use this witness this afternoon, after we set up the movies. It will only take about ten minutes to have him identify the different parts of the ranch.

The Court: All right. Start another witness, Mr. Tonkoff.

(Witness excused.) [79]

MARGARET E. STEVENSON

was produced as a witness in behalf of Plaintiff and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Tonkoff:

Q. You are the wife of Mr. Stevenson, who was just on the stand?

(Testimony of Margaret E. Stevenson.)

A. Yes, that is right.

Q. What has been your husband's occupation, Mrs. Stevenson? A. Farming.

Q. How long have you and your husband been engaged in farming? A. Well, 19 years.

Q. You have been married 19 years, have you?

A. Yes.

Q. Where did you live between '45 and '53?

A. At the Meiss Ranch.

Q. Would you describe the crops on June 10th of 1953?

A. Yes. They were coming along very good.

Q. Incidentally, do you have any recollection of the particular date of June 10th?

A. Do you mean——

Q. Do you remember that date?

A. Yes, I do.

Q. How did you happen to remember it, Mrs. Stevenson? [80]

A. Well, Mr. Welch called and asked how the crops were doing, and we were very pleased that they were coming along.

Q. Do you know where Mr. Welch called you from?

A. It was up in, I think—up north some place.

Q. From Spokane, wasn't it?

A. I think so.

Q. Did he talk to you concerning the condition of the crops? A. He did.

Q. And you had lived on the ranch there all year and previous years? A. Yes.

(Testimony of Margaret E. Stevenson.)

Q. Had you had an opportunity to observe the condition of the growing crops? A. Yes.

Q. Would you tell his Honor just what the condition was and about how high they were then?

A. Well, the first part of the crop was, I would say, five or six inches high. Then of course it varied on down according to when the crops were planted.

Q. Did you have occasion to go over the ranch during the summertime, Mrs. Stevenson?

A. Yes.

Q. Did you observe any change in the condition of these crops during the summer?

A. Yes, I did. [81]

Q. What was that change?

A. Well, they got pretty dry.

Q. Could you recognize the ranch on that map, Exhibit 2, there, the area that represents the ranch?

A. Let's see. Let's get the house here first. If I could find the house, maybe I could get started on the rest of it.

Q. Do you know where the house is?

A. That is what I am trying to find.

Q. It is down on the south side there, the south end.

A. Down here? It has to be over in here somewhere.

Q. Can you describe in about what area of the ranch, as you remember it, it was dry?

A. Well, let's see. It was dry out here—it would be north and east, it was all fairly dry, north and east, and then north and west.

(Testimony of Margaret E. Stevenson.)

Q. Could you describe the soil, the condition of the soil, about harvest time?

A. About harvest time? Well, it wasn't very smooth.

Q. Was it cracked? A. Yes.

Q. Can you describe those cracks, over what area they extended and the size of them?

A. I would be afraid to say.

Q. I see. About how high was the crop? How large had it grown about harvest time? [82]

A. Not very high. I would be afraid to put it into inches, but it seemed awful short.

Q. What was the average growth of the crop? How high would it get there under ordinary conditions?

A. Well, I have had it up to my waist that I know of; maybe a little higher.

Q. On how many occasions did you see Mr. Barr on the ranch there in 1953?

A. Well, let's see now. During the first part when he came, which would be in May, and during the time he planted, which I imagine was around two weeks, I am not just sure, and possibly two or three times after that.

Q. How long would he stay on the ranch?

A. Not very long at a time. We never saw him very much.

Q. In days?

A. I would be afraid to say.

Mr. Tonkoff: That is all.

(Testimony of Margaret E. Stevenson.)

Cross Examination

By Mr. Kester:

Q. Mrs. Stevenson, did you live on the Meiss Ranch yourself all the time from 1945 to '53?

A. Well, we were associated with the ranch, but we were in Macdoel part of that time.

Q. You lived in town yourself up until '52, didn't you? [83]

A. Just a minute. I was on the ranch until '47, maybe '48. I am not just sure, but right in there. And then we lived in Macdoel and we were associated with the ranch, and I helped my father-in-law with the scales there as weighmaster. So I was definitely connected with the ranch and I knew all the comings and goings.

Q. My question was merely where you were living. You were living in town? A. Yes.

Q. You had known Mr. Welch for a long time prior to that, had you not? A. Yes.

Q. He was quite a close friend of your family?

A. Well, he was a friend, I would say.

Q. When he called on June 10th and talked to you, did he tell you that he was getting an interest in the crop?

A. He didn't tell me anything. He asked me how the crops were, and I was so pleased because they were coming. And I said, "They are just fine, just coming along."

Q. Did he tell you anything then about his acquiring an interest in the crop?

(Testimony of Margaret E. Stevenson.)

A. He didn't say anything to me, not like that. He asked how the family was and hung up.

Q. Later on Mr. Welch came down and spent a good bit of the summer with you folks, did he not?

A. Yes, he did.

Q. He lived with your family at that time?

A. He was in the same household, yes.

Q. You folks were using one or some of the ranch buildings yourselves after Clay Barr came into the thing? A. Yes, we were.

Mr. Kester: That is all.

Mr. Tonkoff: That is all.

(Witness excused.)

(Thereupon a recess was taken until 1:30 p.m. of the same day, at which time Court reconvened and proceedings herein were resumed as follows:)

Mr. Tonkoff: If the Court please, may I have Mr. Stevenson look at the pictures? Would you object to having Mr. Welch, who was with him when I took the pictures, testify?

The Court: You have no objection, have you?

Mr. Kester: I haven't seen the pictures.

The Court: As far as you know, you have no objection, have you?

Mr. Kester: As far as I know, no.

The Court: That is all I want to know.

Mr. Holst: Your Honor, I might explain to the Court that this is a 16-millimeter film—— [85]

The Court: Don't explain anything. Get it over with as soon as you can.

(Whereupon the room was darkened and the moving picture films referred to were exhibited to the Court, during the showing of which Mr. James C. Stevenson, Jr., was examined and testified as follows:)

Mr. Tonkoff: Q. Mr. Stevenson, will you just state what these pictures represent as they are shown.

A. This is the southwest corner of the ranch there. This is up along the west side. That is the ditch there.

Q. Is that an irrigation ditch?

A. Yes.

Q. At what time were these pictures taken?

A. They were taken about the 10th of September, about the time they were starting to harvest.

Q. What is that?

A. That is up on the west side. That is barley there. This is up in the dove wheat field we talked about. This is down in the heavier part of the ground. That was fairly close to the heavier portion. There is a ditch that runs to the lake. This is down in the weed patch we referred to.

Q. How much of that area was harvested?

A. Oh, just a small percentage of it.

Q. Is that green part all weeds or grain? [86]

A. The green stuff is weeds and the yellow is grain.

Q. What about that?

A. That is a field of oats there.

Q. Did that have irrigation, that last scene on the film?

(Testimony of James C. Stevenson, Jr.)

A. Well, it was in the lower part of the land, where it was subbed up better, yes.

(Thereupon, during the changing of film in the projector, the following occurred.)

The Court: Mr. Kester, you can either cross-examine after this, or you can have these run again later in the trial, whatever you consider to be fair from your point of view.

(Thereupon the showing of moving pictures was continued and the following occurred.)

The Witness: I believe that is up in the dobe land. That is a field of oats. That is pretty well along on the southwest side.

That shows the wheat in the field on the dobe land. That is a piece that he plowed up.

There is a potato field right across from the wheat. That is wheat, all right, there.

Mr. Tonkoff: Q. How many acres of grain was there?

A. There is the headgate and the ditch running across the field. There is a wheat field again, probably a couple of [87] hundred acres in the wheat field.

Q. Is that green area all weeds?

A. The green area is weeds. This is up in the north central part of the grain field. That is towards the north. There is a potato field. That is up toward the ranch house.

Q. Was Mr. Barr on the ranch at this time?

A. Not until later in the summertime. He left a man up there doing a little work, the tractor

(Testimony of James C. Stevenson, Jr.)

driver did a little work, and his nephew came down in the summertime later, the latter part of July.

Q. Mr. Stevenson, if that property had been farmed in a good and farmerlike manner, would it have produced any rye, wheat and oats?

A. Your rye should make you between twelve and fifteen hundred pounds to the acre. Your oats and barley should make you around 2500 to 3000 pounds per acre, and your wheat the same, in normally good years.

Q. Was this a normal year?

A. That is what I would say, it was a normal year; a very good year.

Q. That is 1953 you are talking about?

A. Yes.

(Thereupon the showing of moving pictures was concluded.)

Mr. Tonkoff: That is all. [88]

Cross Examination

By Mr. Kester:

Q. Did you ever know a year where you got 3000 pounds of wheat per acre?

A. I think pretty nearly any year that we had wheat on there we did.

Q. What year in particular?

A. Well, we raised a little wheat every year that we was there.

Q. And you think you got 3000 pounds per acre every year?

(Testimony of James C. Stevenson, Jr.)

A. Pretty consistently along like that, unless there was frost or something.

Q. Were you present all the time these movies were being taken? A. I was.

Q. How were they taken?

A. They was taken with a movie camera. We would go a little ways and stop and get out of the car and take some more, different shots.

Q. Who took the pictures?

A. Mr. Tonkoff.

Q. Do you know if those pictures have been edited at all before we saw them here?

A. No, I don't. I don't know whether anybody has seen them or not.

Q. You don't know whether all of the movies that were taken [89] have been shown to us?

A. We took two rolls of films that day, and I presume that that is about the two rolls of film there.

Q. Those cracks that you indicated, that was all up in the dobe ground?

A. That was on the west side, yes, and in the dobe.

Mr. Kester: That is all.

Mr. Tonkoff: That is all.

(Witness excused.) [90]

ROLAND P. CHARPENTIER

was produced as a witness in behalf of the Plaintiff and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Tonkoff:

Q. Where do you live?

A. Lewiston, Idaho.

Q. Are you one of the beneficiaries named in the agreement? A. I am.

Q. Did you have occasion to go over the Meiss Ranch in 1953? A. Yes, I did.

Q. What time of the year did you go down there? A. The first part of September.

Q. Were you present when these movies were taken? A. I was.

Q. Who was there besides yourself?

A. I and Mr. Welch and Mr. Stevenson and yourself.

Q. Can you recognize the Meiss Ranch from that map? A. No, I couldn't.

Q. What portions of the ranch did you cover? Did you cover the entire ranch?

A. Yes, we went over the entire part of the farm land and along the dikes.

Q. Did we take pictures of the good grain as well as the [91] weedy ground and where it was plowed? A. Yes, we did.

Q. Would you describe what you observed as to where the dry area was, whether there were cracks?

A. Yes, there was several cracks in the ground.

(Testimony of Roland P. Charpentier.)

Q. How were they for size? What size were they?

A. Oh, they ran from two inches to where I could put my foot in them.

Q. What way? Crossways?

A. Yes, crossways.

Q. Did you ask Mr. Horton Herman to resign as trustee? A. I did.

The Court: What has happened to Dougherty in this case?

Mr. Kester: I understood, your Honor, that in view of the manner in which the interpleader portion of the case was disposed of we regarded that his presence was no longer necessary. I understood he put in a consent to assert a claim to the \$15,000 fund on behalf of Mr. Kirschmer.

The Court: Is that in our file?

Mr. Kester: I understood it was supposed to be. I haven't looked at the file to see if it was.

The Court: Will you look at the file at the recess. Were you served with such a document?

Mr. Tonkoff: Your Honor, I think we were served with a pleading from your office, weren't we, Mr. Kester, in interpleader? [92]

Mr. Kester: Yes, we filed a claim by Mr. Barr to the \$15,000 on behalf of Mr. Kirschmer. I understood that Mr. Dougherty was filing separately a consent by Mr. Kirschmer to that claim. Whether that has been filed or not I don't know.

Mr. Tonkoff: I hadn't received any notice of that, your Honor.

(Testimony of Roland P. Charpentier.)

The Court: You better look at the file at recess.

Mr. Kester: Very well.

Mr. Tonkoff: Would you examine that telegram. I might say, Mr. Kester, that the original of that telegram is attached to the deposition of Mr. Herman.

Mr. Kester: What exhibit number was it?

Mr. Tonkoff: It is No. 6, according to the deposition number.

Q. Did you authorize Judge Cramer to send that telegram? A. I did.

Mr. Tonkoff: We offer it in evidence. It is a request for the resignation of the trustee, Horton Herman.

The Court: Admitted.

(Copy of telegram above referred to was received in evidence and marked Plaintiff's Exhibit 6.)

Mr. Tonkoff: Q. How long did you spend on the ranch there, [93] Mr. Charpentier?

A. Four days.

Mr. Tonkoff: That is all.

Cross Examination

By Mr. Kester:

Q. Are you a farmer yourself, Mr. Charpentier?

A. I am not.

Q. Your work has been what?

A. Club operator at present.

Q. A nightclub operator? A. Yes.

(Testimony of Roland P. Charpentier.)

Q. That has been your line of work quite steadily? A. Off and on, yes.

Q. At the time you came down to the ranch with Mr. Tonkoff and Mr. Welch in the first part of September, 1953, it was for the purpose of taking movies, was it? A. It was not.

Q. He had his movie equipment with him, did he?

A. No. I didn't come down to the ranch with Mr. Tonkoff and Mr. Welch.

Q. Oh, I am sorry. I must have misunderstood. You were with them there taking the movies?

A. I was there at the ranch when Mr. Tonkoff came.

Q. I see. When these movies were taken there was some [94] discussion, was there, about taking them for the purpose of evidence in the trial?

A. Yes, sir; there was.

Q. And at that time, then, there was a definite prospect that you and Mr. Tonkoff and the others were going to sue Mr. Barr; is that right?

A. Yes, sir.

Q. And the purpose of taking those movies was to get evidence for that case?

A. That is right.

Mr. Kester: That is all.

Mr. Tonkoff: That is all.

(Witness excused.) [95]

EDWARD J. WELCH

was produced as a witness in behalf of the Plaintiff and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Tonkoff:

Q. Mr. Welch, you are one of the beneficiaries of this declaration of trust? A. Yes.

Q. Would you examine that instrument, which has been marked for identification as Plaintiff's Exhibit 7, and see if that is your signature and if the parties signed it in your presence in Spokane, Washington. A. It is.

Q. What date was that signed?

A. June 10th.

Q. And on June 10th prior to the time that this instrument was executed did you make any call?

A. Yes, I did.

Q. Where did you call?

A. I called Mr. Stevenson—I called for Mr. Bud Stevenson, Jr., at the Meiss Ranch at Macdoel, west of Macdoel, and I called from the Davenport Hotel in Spokane, Washington.

Q. What was the purpose of that call?

A. The purpose of calling was to find out the condition of the crops on the ranch at that time.

Q. Pursuant to the advice that you received on making that call, did you execute this agreement?

A. That is right.

Q. At that time did you talk to Mr. Barr at Spokane concerning the crops? A. No.

(Testimony of Edward J. Welch.)

Q. Did he make any statement to you at any time as to the value of the crops?

A. Well, the only statement he made was before our settlement, before I made the call, of the prospects of a good crop on the ranch.

Q. Did he tell you what the value of it was at that time?

A. Well, he said the value would run anywhere between a quarter of a million and three hundred thousand dollars. That would be the prospects of a decent crop off the ranch.

Q. Did you call Stevenson subsequent to that conversation with him or before? Did you call after he told you that? A. Yes, after.

Q. I see. Now, did you have occasion to go to Dorris or to Maedoe where the Meiss Ranch is prior to July?

A. I did, right around the 1st of July. I couldn't say the exact date, but it was right at the 1st of July I drove down.

Q. What observations did you make down there?

A. Well, the grain was burning up, and I immediately got [97] in the car and come back to Yakima and contacted you.

Q. What was done at that time?

A. At that time, why, we called Mr. Horton Herman at Spokane and asked him if he would come down to see first-hand the condition of the crops.

Q. Were arrangements made for Mr. Herman, yourself, myself and Mr. Barr to go down there?

(Testimony of Edward J. Welch.)

A. They were.

Q. Did Mr. Horton Herman go with you?

A. No.

Q. Who did go on that trip?

A. You and Mr. Barr and myself. We came up in your plane at Arlington and flew into the ranch—or to Klamath Falls.

Q. About what time of the month was that, if you recollect?

A. That would be in the early part of July, right after the first somewhere. I can't remember what date.

Q. And after we arrived at the ranch did we have a conversation and did you show Mr. Barr the condition of the crops?

A. We did. We went over the ranch with him and showed him, and you and I had an agreement with him that he would—the next few days he would be down with a crew of men and irrigate the ground.

Q. Did he state when he was going down and irrigate?

A. He said that the following Monday morning he would be there with a crew. [98]

Q. When were you with him down there, what date, do you remember?

A. It was Thursday or Friday, but I can't remember the exact date.

Q. When did you next go down to the ranch?

A. The next time I went to the ranch was right around the 1st of September. He had written us a

(Testimony of Edward J. Welch.)

notice, according to his agreement with us that he would notify us ten days before he started harvesting, so he sent us that notice and you informed me to go down and watch the operation.

Mr. Tonkoff: Your Honor, I move for the admission of Exhibit No. 7, which is admitted in the complaint or in the answer as the declaration of trust.

The Court: Admitted.

(The Declaration of Trust referred to was thereupon received in evidence as Plaintiff's Exhibit 7.)

Mr. Tonkoff: Q. Now, showing you Exhibit No. 8 for Identification, Mr. Welch, I will ask you if that is the correspondence which you received from Mr. Barr stating that he would start to harvest in the following ten days. A. That is it.

Q. What is the date of that?

A. The date of this is July 10th, 1953, and the starting date was September 1st, 1953. [99]

Mr. Tonkoff: I will offer that in evidence, your Honor.

Mr. Kester: May I see it, please?

Mr. Tonkoff: Q. Do you recognize Mr. Barr's signature? A. Yes, sir.

Q. Is that his signature on that paper?

A. Yes.

Q. You have had dealings with him in the past, have you? A. That is right; I have.

Q. Now, pursuant to the receipt of this Exhibit

(Testimony of Edward J. Welch.)

8 for Identification did you proceed to go out to the ranch? A. I did.

Q. Had you been down there previously after July 2nd, previous to the time you received this and after July 2nd?

A. You mean in between them two times?

Q. Yes. A. No.

Mr. Tonkoff: Do you have any objection to that, Mr. Kester?

Mr. Kester: No, it is all right.

Mr. Tonkoff: We offer that in evidence.

The Court: Admitted.

(The letter referred to, dated July 10, 1953, was thereupon received in evidence as Plaintiff's Exhibit 8.)

Mr. Tonkoff: Q. When you went down there to the ranch [100] when did you go down?

A. The last time I went—let's get this straight—it was September 1st.

Q. At that time was Mr. Barr harvesting?

A. No, sir; they hadn't started yet.

Q. Was he down there? A. No.

Q. When did he arrive?

A. Now, I can't tell you exactly, but I think they started harvesting sometime probably the 15th or 16th of September, or something along there, along about that time. A little after they had started harvesting was the first time I seen him there.

Q. After you got there what did you do?

A. After I got there——

Q. Did you examine the land and the crops?

(Testimony of Edward J. Welch.)

A. I just examined the crops and helped shoo the ducks off, and I just waited until they was getting ready to harvest.

Q. Under what circumstances did I happen to come down and take these pictures?

A. What?

Q. Under what circumstances was it that you asked me to go down there?

A. I called you at Yakima and told you that I thought it would be a good thing for us to come down and get some pictures [101] of the ranch and the crops, and one thing and another, because we would probably have to use them later.

Q. Had you farmed in that area previously?

A. Yes. Not in the Macdoel Valley or Butte Valley, but over across the hill east a little, Tulelake and Klamath Falls Valley.

Q. How far is Tulelake?

A. Oh, straight air line across there would be about 12 miles, I would say.

Q. Is that area about the same climate and the same soil conditions?

A. About the same thing, yes.

Q. How long did you farm down there?

A. About 26 years.

Q. What did you grow?

A. Everything that they grow there: Barley, oats and wheat.

Q. You had some experience and knowledge of the manner of farming down there? A. Yes.

Q. When you first observed the crops after you

(Testimony of Edward J. Welch.)

got there in September, was it obvious to you that the crop was way under——

A. That is right. You could see plainly that he had about, I would say, a third of a crop. [102]

Q. Could you determine why it was so small?

A. Why, sure. He hadn't irrigated it; he hadn't sprayed the weeds on a lot of it. He let his drain ditches back up and sub out about two or three hundred acres of it.

Q. What about the weeds?

A. Well, he didn't spray them. His ditches was weedy, and consequently two or three hundred acres he couldn't cut.

Q. About how much was plowed up from what you observed?

A. I would say about 200 acres, as an estimate.

Q. Did he at any time notify you that he was doing to plow some of the grain up?

A. He did not.

Q. What portions of the ranch did we take pictures of, Mr. Welch?

A. Well, we took pictures of the general farm area, I would say probably 2500 acres.

Q. Where it was dry how high was the grain?

A. Oh, about six or eight inches; something like that.

Q. Was it as high as your knees? A. No.

Q. Where there was moisture, around the ditch banks, how high was the grain?

A. It would be probably waist-high, pretty near.

Q. Were you there during harvest time?

(Testimony of Edward J. Welch.)

A. Yes. [103]

Q. Who was operating the harvester?

A. I didn't pay too much attention to who was operating. He had two or three boys there.

Q. Can you tell me how they operated the machines?

A. Well, if they would have been operating for me, they wouldn't have been operating at all.

Q. Just tell us how they operated there.

A. Well, it looked to me like they didn't know very much about what they were doing. They were running the machines so fast they were kicking a lot over, the side rigs was kicking it over. And their header was knocking a lot of small stuff down so that it wouldn't cut it.

Q. Was any grain left on the property after they harvested?

A. Naturally there will be when you throw it over the back end.

Q. How much would you say was in the fields per acre?

A. Oh, I would say the way they were harvesting lost five or six hundred pounds to the acre, at least. That is a hard one to estimate.

Q. Did you notice how they were hauling the grain away? A. Yes.

Q. Would you describe that.

A. Well, I thought that was rather odd, that they wouldn't want to save their grain. They would take their trucks and tear off down the road, and a lot of it would blow off the [104] top and it would

(Testimony of Edward J. Welch.)

spill out of holes through the truck beds, and the roadway looked like somebody was trying to pave it with grain.

Q. For what distance could you see that grain on the road?

A. Oh, about five or six miles, all the way from the ranch to the highway.

Q. Now, you say you were there when the ducks and the geese came in? A. Yes.

Q. What did you do to drive them off?

A. Well, the same thing you usually do. You usually take a car and go down there with a shotgun and shoot around until late in the evening, when they go back to the water, and early in the morning you get up when they start in again. Sometimes at night, when it is a really moonlit night, they will come in in the middle of the night.

Q. Can you tell in acres about how much acreage was lost due to the ducks and geese?

A. I would say at least—an estimate would be 60 to 80 acres.

Q. How were the weeds when you saw them on July 1st in comparison to the pictures that we saw?

A. Well, in July they were just starting. Your grain when it is up—your weeds start along after your grain. Your grain will get ahead of your weeds, and then a little while [105] later the weeds come up and get ahead of the grain and force out the grain, and you have got a beautiful weed patch and that is all you have got.

(Testimony of Edward J. Welch.)

Q. In your experience was it customary to spray for the weeds?

A. They have always done it at Tulalake, and the whole area. The weeds has been a bad thing in this country for years.

Q. Did you have any idea what the crop would bring when you first went down and before it was harvested?

A. Yes. I estimated the probable value of it.

Q. Do you know what the production is in that area for wheat, rye, oats and barley?

A. Yes, I have a fair idea.

Q. Would you state what it is.

A. Well, I would say on barley you could get anywhere around 3000 pounds, the same way for oats, and wheat, oh, anywhere from 1800 to 2500.

Q. What about rye?

A. Rye I would say 1500 or 1600 pounds, good rye.

Q. Mr. Welch, did you at any time demand that Horton Herman resign? A. Yes.

Q. As trustee? A. Yes. [106]

Q. Showing you Exhibit 9 for identification, is that a photostatic copy of a telegram which you sent to Mr. Horton Herman? A. Yes.

Mr. Tonkoff: I might say, your Honor, that the original of this is attached to the Horton Herman deposition.

The Court: Admitted.

(Photostatic copy of the telegram referred to was received and marked Plaintiff's Exhibit 9.)

(Testimony of Edward J. Welch.)

Mr. Tonkoff: Q. Is that a photostatic copy of the telegram? A. It is.

Q. Did your wife also authorize you to request it? A. That is right; she did.

Q. Why was a demand made on Herman to resign?

A. As I understood it, the main demand for his resignation was the fact that he come down here when we had this case scheduled a year ago—he came down here and called it off, somehow.

Q. Incidentally, whom did he represent in the Spokane case which resulted in the settlement and this trust agreement document? A. Mr. Barr.

Q. In the Spokane case who made the offer of settlement?

A. Mr. Barr and Horton Herman.

Mr. Tonkoff: That is all.

Cross Examination

Mr. Kester: Q. Whom did Mr. Tonkoff represent? [107] A. Myself.

Q. In other words, two trustees were the adversary attorneys in that lawsuit up there?

A. That is right.

Q. Mr. Tonkoff had a personal interest also because of his attorney's fees, did he?

A. That would be his only reason, as far as I know.

Q. And Mr. Herman had a personal interest because of his attorney's fees?

A. That is right, I presume.

(Testimony of Edward J. Welch.)

Q. I understand you to say that Mr. Herman came down here and called off the former trial?

A. That was my understanding.

Q. You have no personal knowledge about that?

A. No, just through my attorney, Mr. Tonkoff.

Q. You made this demand on Mr. Herman to resign merely because Mr. Tonkoff told you to, didn't you? A. Well, yes.

Q. How did you determine that there was five or six hundred pounds lost per acre in the harvesting?

A. That is just the best explanation I can give you of it. We usually plan about 130 pounds to the acre when you plant a crop of grain down here. And that, you know, is just dribbled along here and there. Okeh. If you take a wide strip behind the combine, say 36 inches—that would be your cylinder [108] width—and you found that grain on the ground quite a bit thicker, that would give you some estimate of about how much you were losing.

Q. Are you sure there was five or six hundred pounds per acre?

A. I would say that, yes.

Q. There were about 3300 acres altogether?

A. No, there wasn't that many.

Q. Taking out the potato ground, there was about 3300 acres of cultivated land there, wasn't there?

A. No, I can't answer that question. I don't know.

Q. You don't know. All right. Are you saying

(Testimony of Edward J. Welch.)

that on every acre of grain ground there was five or six hundred pounds of grain lying after the harvest?

A. Of the acres that they harvested, yes.

Q. Did you go over every acre yourself?

A. No.

Q. You didn't see every acre yourself?

A. Not every particular acre. You don't naturally do a thing like that.

Q. Then you can't say that there were five or six hundred pounds lying on every acre, can you?

A. I didn't say that. I said that is about what I estimate.

Q. You estimated it merely by a comparison with what it looks like after seeding? [109]

A. Yes, and by former experience in threshing grain.

Q. How long were you down there during the summer of 1953? Can you give us the times you were down there?

A. About 30 days, I think.

Q. Altogether? A. Yes.

Q. And on what different occasions, again, please? A. Well, all during harvesting.

Q. That was about how long?

A. About 30 days.

Q. About 30 days?

A. Something like that. It could have been a little less; could have been a little more. I don't know.

Q. So most of the time you were down there

(Testimony of Edward J. Welch.)

was during the harvest? A. That is right.

Q. You were only down there once or twice besides during harvest? A. Once I was.

Q. Once?

A. Maybe twice. Twice, I believe that is right. I went down and come back.

Q. What were those dates?

A. About the 1st of July I drove down. That was the first time after we took the assignment of the crop, and the next time I was down with Mr. Tonkoff. We flew down. [110]

Q. That was on what date?

A. Oh, that would have been a little later in July, the first of July somewhere.

Q. Around the first of July?

A. Around the first of July.

Q. So the only times you saw the ranch were the first few days of July and then the month during harvesting; is that right?

A. That is right.

Mr. Kester: I think that is all.

Redirect Examination

By Mr. Tonkoff:

Q. Mr. Welch, who fixed the attorneys' fees in Spokane as to who was to receive the respective amounts between Mr. Herman and myself?

A. Well, I would say Mr. Barr and Mr. Herman, they set the fees.

Q. Were they the ones that arranged the amount of \$15,000 to be paid for these fees?

(Testimony of Edward J. Welch.)

A. That is right.

Q. You and I had no discussion concerning that? A. Not any.

Q. Can you state about how many acres were planted to grain down there, Mr. Welch? [111]

A. As nearly as I could figure it from the photostat of the Soil Conservation Map and the acreages in different places, there was somewhere between twenty-five and twenty-six hundred acres that was actually planted in grain.

Mr. Tonkoff: That is all.

Recross Examination

By Mr. Kester:

Q. Did I understand you to say that you had a conversation with Mr. Barr and Mr. Herman with respect to setting the attorneys' fees?

A. Why certainly. When we were in Spokane on that case they wanted to settle it. We had them in Spokane—or Mr. Barr we had on a case in Spokane for fraud, and he wanted to get out of it.

Mr. Kester: Just a minute. Incidentally, your Honor, I didn't object to all this when it came in, but obviously the circumstances surrounding the Spokane case are immaterial here. Everything is going in more or less without objection.

The Court: As background.

Mr. Kester: But your Honor will appreciate that I don't mean to waive my position by inquiring into something they have brought up.

Q. Did you have a direct conversation with Mr.

(Testimony of Edward J. Welch.)

Barr where the amount of attorneys' fees was discussed? [112]

A. Not as to the attorneys' fees, no.

Q. So that what you said earlier, if I understood you to that effect, was wrong; is that right?

A. No, it is not necessarily wrong. I was with the group, and we were all interested in this. We still are. We got \$72,500 tied up in this thing. Naturally, we wanted to know what was going on, and who was to get what slices of what.

Q. I am trying to find out what you personally know, and not what you picked up from conversations with other people. Now did you personally have a conversation with Mr. Barr about the amounts of these settlements? A. Yes.

Q. And did you personally discuss the amount of the attorneys' fees with Mr. Barr?

A. No, I didn't personally discuss them. They discussed them in my hearing.

Q. Who?

A. Mr. Barr, Mr. Tonkoff, Mr. Herman, Mr. Charpentier and Mr. Cramer, Judge Cramer.

Q. So it was not just set by Mr. Barr and Mr. Herman, then? All those other people participated?

A. No, they didn't participate. We were all there to agree on what we were going to do here. Those interested in different stages of it, certainly, they had their own conversations and their own deals. [113]

Mr. Kester: I think that is all.

(Testimony of Edward J. Welch.)

Redirect Examination

By Mr. Tonkoff:

Q. Mr. Welch, did I make any statement whatsoever as to what my attorney's fee should be?

A. You didn't to me.

Q. In the presence of Mr. Herman?

A. I never heard you in the presence of anyone.

Q. Did Mr. Herman suggest what my attorney's fees should be? A. No.

Q. What was said about attorneys' fees in that settlement where Mr. Herman also got \$10,000?

A. What was said about it?

Q. Yes, what was said about attorneys' fees?

A. Well, all I was interested in the thing was when you cut the thing up you was supposed to get your fifteen and Herman was supposed to get his ten.

Q. What I mean is who brought the amount of attorneys' fees up, do you know?

A. Mr. Herman.

Q. Did I at any time make any suggestion concerning how much the attorneys' fees should be which were received by either Mr. Herman or myself? [114]

A. No.

Mr. Tonkoff: That is all.

Recross Examination

By Mr. Kester:

Q. It was Mr. Herman and not Mr. Barr?

A. Well, take it however you want to.

(Testimony of Edward J. Welch.)

Q. I am asking you what the fact is.

A. Well, to my knowledge it was Mr. Herman. He was his attorney.

Mr. Kester: All right. That is all.

Mr. Tonkoff: That is all.

(Witness excused.)

Mr. Tonkoff: Mr. Kester, Mr. DeFrancq brought in his computation of the proceeds from this crop. Can you agree that that may be introduced in evidence, the amount that the crop brought?

Mr. Kester: I have no reason to doubt that it is correct. Mr. Barr had nothing to do with that settlement for the crop. Your representatives handled that with the representatives of Mr. Hofues and Mr. Kirschmer. Whatever you sold the crop for you should know. Mr. Barr had nothing to do with that. If that is what you sold the crop for, we will admit it. [115]

Mr. Tonkoff: Of course, we had nothing to do with the sale of the crop. I make that statement now. Anyway, do you have any objection to that going in evidence?

Mr. Kester: I say, if you say that is what the crop sold for, I will take your word for it.

Mr. Tonkoff: I don't know any more about it than you do, because this was furnished by Mr. DeFrancq for Kerr-Gifford, and I accept it as being a true statement without any controversy over it. I will offer it in evidence, your Honor.

The Court: Admitted.

(The statement of Kerr-Gifford above referred to was received in evidence and marked Plaintiff's Exhibit 10.) [116]

JOHN W. CRAMER

was produced as a witness in behalf of the Plaintiff and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Tonkoff:

Q. What is your profession, Mr. Cramer?

A. I was an attorney-at-law. I am now a judge.

Q. You are a judge now. Of what court are you a judge?

A. The Tenth District in Idaho.

Q. That is Lewiston?

A. That is right; Lewiston, Idaho.

Q. At the time that this controversy occurred—I will ask you this: When did you go on the bench, Judge Cramer? A. In January of 1953.

Q. Prior to that time you were a practicing attorney, were you? A. That is right.

Q. Did you represent Mr. Charpentier in some litigation? A. Yes, I did.

Q. And arising out of that litigation were you ever in Spokane when this declaration of trust was drawn and executed? A. I was.

Q. That is your signature, I believe?

A. Yes.

Q. You have examined that document? [117]

A. Yes.

(Testimony of John W. Cramer.)

Q. Judge Cramer, if you will refer to this telegram—I think it is No. 7 or 8—I will ask you if that is a photostatic copy of a telegram which you sent Mr. Herman demanding his resignation.

A. It is.

Q. Was it sent on behalf of Mr. Charpentier?

A. Both Mr. and Mrs. Charpentier.

Mr. Tonkoff: That is all.

Mr. Kester: No questions.

(Witness excused.)

Mr. Tonkoff: If the Court please, we have some depositions of witnesses who are not here. Could we read them?

The Court: I have read them.

Mr. Tonkoff: Oh, you have read the depositions. We offer the films in evidence, your Honor.

The Court: Admitted.

(The moving picture films heretofore exhibited to the Court were received in evidence and marked Plaintiff's Exhibit 11.)

Mr. Tonkoff: Have you read Horton Herman's deposition, your Honor? [118]

The Court: I will this evening. I think I have read it. Are these new depositions since the last hearing?

Mr. Tonkoff: Yes, your Honor. These were taken of witnesses in Klamath Falls. I think this was sent in here about three or four days ago.

The Court: You give the Crier here the depositions that have been taken since the last hearing. I have read everything up to the last hearing. You

give him what has been taken since the last hearing and I will read them this evening. You sort out the ones that were taken since the last hearing.

Mr. Tonkoff: This one deposition includes also the two Mr. Stevensons' testimony, and there are five other witnesses besides that which we offer.

The Court: I will take them all home tonight, Gentlemen, to make sure I have read them all.

Mr. Kester: Are you offering the exhibits that were taken in connection with the depositions, also?

Mr. Tonkoff: They are part of the depositions. Your Honor, in connection with the exhibits which are attached to Mr. Herman's deposition, I am offering those, too, and, in addition thereto, his resignation, the original of which I have here. That is Mr. Herman's resignation.

Mr. Kester: I have no objection except for the legal question that it is void. I have no objection to it going in evidence. [119]

(The resignation of Horton Herman above referred to was received in evidence and marked Plaintiff's Exhibit 12.)

Mr. Tonkoff: Excuse me, Mr. Kester. I am also offering, your Honor, a demand and release which is signed by all of the beneficiaries—all of them, that is, except Harvey Barr, dated January 27th, in which Mr. Herman demanded of us a release of any claims of any kind whatsoever.

The Court: Make your statement, Mr. Kester.

Mr. Kester: In connection with the Herman deposition there was indentified at that time the

complaint in the Spokane lawsuit which was being settled, and at that time in connection with that offer I obtained a copy of the answer and put it in also. It is my position that the pleadings in that case are wholly irrelevant and immaterial. I just don't want the point to be waived by my failure to mention it here.

The Court: The depositions are admitted, together with all exhibits attached, subject to the objections as have been stated or may hereafter be stated prior to the final submission of the case.

(The demand and release above referred to, dated January 27, 1953, was received in evidence and marked Plaintiff's Exhibit 13.)

HARVEY BARR

was produced as a witness in behalf of the Plaintiff and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Tonkoff:

Q. Mr. Barr, are you the father of Clay Barr?

A. Yes, sir.

Q. Mr. Barr, on or about July 9th of 1954 did you purchase Mr. Horton Herman's interest?

A. I purchased it.

Q. What did you pay for that interest?

A. He sold me his \$10,000 interest for 75 cents on the dollar, or \$7,500, and I bought it at about that time.

Q. You are the beneficiary now under this, and

(Testimony of Harvey Barr.)

as a result of that purchase you stepped into Mr. Horton Herman's shoes and are expecting a division of these funds, are you not?

A. Well, I expect a division of this money that is in the hands of the grain company or the Court, or wherever it is at this time. I don't know.

Q. You expect to get the full amount of Mr. Herman's \$10,000 if the Court sees fit to award the beneficiaries a judgment?

Mr. Kester: I will object to that as purely a legal question.

The Court: He may answer.

A. I don't know whether I understand the question or not. [121]

Mr. Tonkoff: Q. Don't you expect to get the full \$10,000 in payment of your purchase if there are funds available to pay it?

A. It depends on where that fund comes from. I want my part of the barley. I am a farmer, and I want my part of what that crop is bringing.

Q. When you say it depends on where the funds come from, does it make any difference to you from where the funds might be derived to pay your full \$10,000? A. Yes, it does.

Q. What difference does it make to you, Mr. Barr?

A. Well, I don't want it to come through no suit or anything of the kind, or any part of it. I want it to come from the sale of the barley, just as the original contract stands.

(Testimony of Harvey Barr.)

Q. You mean you don't want your son to pay it?

A. I don't want anybody to pay it except the barley.

Q. You do make a claim to these funds that are now held by Kerr-Gifford? A. Yes.

Q. What sum do you think or do you claim, or make a claim on? There is over \$44,000 deposited. Do you make claim to the whole \$44,000?

A. I am making a claim on my proportion of it except the \$15,000 that is due Clay out of it.

Q. You mean you want your son to take that \$15,000 and divide the rest of the money? [122]

A. That is the way that the contract was written, I believe.

Q. So that your son won't be hurt financially in this transaction?

A. I ain't particularly interested in who is hurt. I just want it to come out the way it should come out.

Q. You say you are not particularly interested in who is hurt. Weren't you expecting to get a bargain when you bought that for \$7500?

The Court: Oh, that is enough.

Mr. Tonkoff: All right. That is all, your Honor.

Cross Examination

By Mr. Kester:

Q. Mr. Barr, did you authorize the bringing of this action?

A. I gave authorization of nothing. I will take

(Testimony of Harvey Barr.)

that back. I authorized the insurance on this grain.

Q. Did Mr. Tonkoff ask you about bringing this lawsuit?

A. He never asked me anything about bringing this lawsuit.

Q. Did you ever give any consent to the bringing of this lawsuit?

A. I never gave any consent to anybody for anything except to pay for fire insurance on the crop.

Mr. Kester: Thank you. [123]

Redirect Examination

By Mr. Tonkoff:

Q. Mr. Barr, where do you live?

A. I live in LaCrosse, Washington.

Q. What is that?

A. I live in LaCrosse, Washington.

Mr. Tonkoff: That is all, your Honor.

(Witness excused.)

Mr. Tonkoff: Under the circumstances, your Honor, assuming that the depositions or the testimony in the depositions is in evidence, we rest.

The Court: You better offer them. You better offer the depositions. You can do it at recess and put them in the record. Take your time at recess. Then you won't be in a hurry. State them to the Reporter at that time.

Mr. Tonkoff: All right, your Honor.

The Court: Otherwise you rest, do you?

Mr. Tonkoff: Yes.

The Court: Go ahead. [124]

Defendants' Evidence

LESTER LISTON

was produced as a witness in behalf of Defendants and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Kester:

Q. Where do you live, Mr. Liston?

A. Klamath Falls, Oregon.

Q. What is your work?

A. Aerial crop spraying.

Q. How long have you been in that business?

A. Pretty nearly three years. But I went in with my brother, who has been operating since 1947.

Q. Do you operate under a business name?

A. Farmers Air Service.

Q. Tell us briefly about how this aerial spraying works. How do you go about doing it?

A. Well, we solicit our jobs in order to have steady customers to work for. Then different types of weeds require different amounts of 2-4-D—speaking of weed control—they require different amounts of 2-4-D. And there is a certain stage of development in the grain that you can spray.

Q. Is 2-4-D the standard spray for weeds in that area? A. That is right.

Q. You say there is a certain stage when it can be done. What is that stage? What is the stage of the grain, roughly? [125]

(Testimony of Lester Liston.)

A. The plant should have at least three leaves on it. Preferably it should be from, oh, four to six inches high, and from that time until it reaches the boot stage where the head begins to develop in the plant. The height of it doesn't make any difference. It is just the development of the plant itself.

Q. What happens if you spray grain for weeds when it is not in the stage of development you have described? A. What happens to——

Q. To the grain?

A. To the grain plant? That will depend on how much 2-4-D you put on. A normal dosage, up to two or three pints per acre, has relatively little effect on it, although I would like to explain it could——

Q. If the plant is weak or sickly, what effect does 2-4-D have on the grain?

A. Enough 2-4-D leaves blank heads. There is no grain or mis-formed heads.

Q. Are you familiar with the type of weeds on the Meiss Ranch, particularly in the area west of the dike and in the southeast portion of the cultivated area? Are you familiar with that area?

A. Is that the one that they call the weedy area?

Q. Yes. [126]

A. I believe so.

Q. Do those weeds have a name?

A. We call them an alkali weed. They have a technical name, but I don't know that.

(Testimony of Lester Liston.)

Q. Are they pretty tough? What is the fact about that kind of weeds?

A. They are particularly obnoxious, yes. They are difficult to kill.

Q. Does it take quite a bit of 2-4-D to kill that kind of weeds? A. Yes.

Q. Were you on the Meiss Ranch in 1953?

A. Yes.

Q. How many times were you there?

A. Twice.

Q. When was the first time?

A. The middle of May, I would imagine, between the 15th and the 20th of May. That is a guess.

Q. What was the occasion of your being there?

A. I went to solicit work.

Q. Whom did you talk to?

A. I talked to Mr. Stevenson, Jr., and Mr. Barr.

Q. What was the gist of that conversation?

A. Well, at that stage of the grain there wasn't any of it ready to spray as yet. Mr. Barr said that if he needed any spraying done he would get in touch with me, so I didn't go back there again until he called me.

Q. Were they still planting at that time?

A. I believe so, although I didn't get over much of the ranch. It just happened this part of it had been seeded early, was the only part I got over at that time.

(Testimony of Lester Liston.)

Q. Which portion are you referring to as being seeded early?

A. This piece east of the dike and next to the lake there, I suppose. It is stuff that was up. The grain was up more in this spot down in here.

Q. I think you said east of the dike. You mean west of the dike? East of the dike is all lake.

A. Oh, west of the dike, yes. Excuse me.

Q. That was coming up at that time, was it?

A. Yes.

Q. Were there weeds visible at that time?

A. Yes.

Q. What was the stage of development of the grain at that time in that area?

A. Well, it had just begun to come up. It was coming up, most of it—the plants had broken ground, and some of them were up perhaps two inches, if I remember correctly.

Q. Could you tell at that time whether the grain in that area was going to be healthy or not?

A. Well, no, I don't say that I could. [128]

Q. Did you come back later on? A. Yes.

Q. When was that?

A. It was about the 1st of July. Mr. Barr called my home and said he wanted some spraying done, so I went down, I believe, the following day, which would have been probably the 2nd or 3rd of July.

Q. Did you talk to him there? A. Yes.

Q. What was that conversation?

Mr. Tonkoff: That is objected to as hearsay, your Honor.

(Testimony of Lester Liston.)

The Court: Overruled.

Mr. Kester: Q. What was the conversation?

A. He said he had some weeds he wanted sprayed, and I looked at them. The weeds were—this particular type of weed was too big to spray, and the grain was in the boot stage, so you couldn't spray it without damaging the grain.

Q. What area were you referring to?

A. Well, this stuff here west of the dike, and then we looked at some grain up in this area, I believe it was. I am not familiar with the map.

Q. The last time you were pointing to an area north or across the ditch that goes across the middle of the old bottom there.

A. That is right. I believe that is the area that we were in. We did do some spraying in there.

Q. This area in the southeast part of the cultivated ground west of the dike, what was the condition of the grain then as far as being healthy or not?

A. Well, I would say it wasn't too healthy.

Q. What was the condition of the soil, then, as you looked at it? Could you tell?

A. Well, I didn't examine it a great deal. After we saw the condition of the plants and the condition of the weeds there wasn't anything that we could do about it. This particular weed, after it gets up six or eight inches, possibly, at the extreme in height it takes so much 2-4-D to kill it that it wouldn't be practical. You would kill the grain or damage it severely.

(Testimony of Lester Liston.)

Q. Is that what you advised Mr. Barr?

A. That is right.

Q. With respect to the other area north of the cross ditch, what was the condition up there?

A. We found one area just off the cross ditch in this general locale that the grain was not in the boot stage, and there were some weeds in it and we did spray a little portion of that.

Q. When did you do that spraying?

A. That was within the next two or three days, I believe.

Q. Did you do any other spraying around there?

A. We sprayed some of the ditches down in this area.

Q. Now, did you look over the entire cultivated area there with respect to the weed condition?

A. Not all of it, no.

Q. Did you look around other places besides the two that you have already mentioned?

A. We did drive around over quite a lot of the area, but in respect to the map I couldn't tell you where it is at this time.

Q. Aside from the two areas that you have mentioned, did you see any other places that needed spraying?

A. I don't recall that I did. It has been quite a while ago.

Q. Did you notice the potato patch in there?

A. Yes.

(Testimony of Lester Liston.)

Q. What would be the effect if you got any of that spray on growing potatoes?

A. Well, you just can't do it.

Q. Would it kill the potatoes?

A. That is right.

Q. For that reason do you have to stay some distance away from a field of potatoes in your spraying?

A. Yes. It would depend upon the prevailing winds, how close you can get. If the wind is blowing away from the potatoes, you can spray quite close. If it is blowing towards them, why, you can't spray close at all—a quarter of a mile or perhaps more. [131]

Q. Can you spray when it is wet and rainy?

A. Not to much advantage. If it is raining much, you can't.

Q. Do you recall what the weather was like in the spring of 1953 during May and June?

A. Well, we didn't work in that area at all that year. Our work was confined to the Klamath Basin, and I don't recall too much about it.

Q. What is the usual time for spraying in that area? When does it usually get in the condition where you can spray?

A. Well, that depends on an early or late season. The earliest we ever get started down there is, oh, possibly the first week in June, and usually it is around the 10th of June, and will run up until the latter part of July.

Q. Most of the spraying is done during July?

(Testimony of Lester Liston.)

A. Most of it from the middle of June until the middle of July.

Mr. Kester: I think that is all.

Cross Examination

By Mr. Tonkoff:

Q. Mr. Liston, how long have you lived in that community?

A. In Klamath Falls three years.

Q. How long? A. Three years. [132]

Q. I thought you said you were in business there from 1947?

A. My brother. I went with my brother, who had been operating out of there since that time. He was the first weed-sprayer in that area, aerial sprayer.

Q. It is customary to spray crops when the weeds are coming up, is it not?

A. Well, the smaller you can get the weeds the better it is for the grain if it is big enough.

Q. When you talked to Mr. Barr in May, that was when he was planting, was it not?

A. I understand that that is right.

Q. And then you never saw him again until July 2nd, is that right?

A. That is approximately right.

Q. These weeds must be sprayed when they are just right; otherwise, it doesn't do any good, as you say; is that right? A. That is about right.

Q. The weeds that you looked over there were too big to spray, weren't they?

A. That is right.

(Testimony of Lester Liston.)

Q. They should have been sprayed before that, shouldn't they?

A. Well, that I don't know. I wasn't in there from the middle of June until the 1st of July, and I don't know whether there was a stage in there getting the grain conditions right [133] and the weed conditions right—whether you could spray or not. I wouldn't be able to say at all.

Q. Well, if the weeds were too big, they were smaller sometime prior to that time, and they could have been sprayed at a time when they would have been killed and the grain saved; isn't that right?

A. I can't hear you.

Q. I say, there was a period sometime before July 2nd when those weeds could have been sprayed and killed and it would have given the grain opportunity to grow; isn't that right?

A. I wouldn't be able to say that. There may have been a period in there that you could have enacted some control. That particular weed is very difficult to kill. As I say, you have to get it when it is quite small and when the grain is started enough to stand a pretty heavy dosage, in order to get a kill.

Q. You are not in a position to tell us whether or not there was a time there when that was ideal to spray, then, are you?

A. Not having been there—there was a period of about six weeks I wasn't on the place at all. I wouldn't say, no.

Q. The weeds were about a half a mile away

(Testimony of Lester Liston.)

from where that potato patch was, weren't they?

A. Well, as I recall, I would say about a quarter of a mile.

Q. Haven't you in your business sprayed one kind of a crop next to another one where it was growing, and where one crop would be injured by the spray and the other one would be benefited?

A. I have sprayed quite close when the wind is right. I can't spray too close——

Q. You get with in 30 or 40 feet of them, don't you, of one crop and the other?

A. Not than close to potatoes.

Q. Certainly you could have sprayed some of that wheat, or that wheat could have been sprayed?

A. As far as the proximity to the potatoes, that could have been sprayed, probably.

Q. The only reason you didn't spray it was because he never asked you to come out and spray prior to July 2nd; is that right, Mr. Liston?

A. Well, that is the only reason we didn't.

Q. There is a need to spray down there——

A. I would like to correct that. I wouldn't say it is the only reason we didn't. We will spray any time that we feel we can do our customers some good.

Q. Anyway, it was too late for you to do Mr. Barr's grain crop any good, by July 2nd; isn't that right?

A. That is right, except for the portion that we did spray.

(Testimony of Lester Liston.)

Q. There weren't any weeds visible there when you first went out there May 15th, were there?

A. Yes, sir; there were quite a number.

Q. You say there were quite a bunch of weeds?

A. Yes, there was.

Q. They should have been sprayed long before July 2nd, shouldn't they?

A. Well, if they were to be sprayed at all they should have, yes.

Mr. Tonkoff: That is all. Thank you.

Redirect Examination

By Mr. Kester:

Q. How big were the weeds in the middle of May when you saw them, do you recall?

A. Oh, I would say probably an inch to an inch and a half. That is a guess.

Q. And how tall was the grain at that time?

A. Oh, probably just a little bit taller. Some of it was just breaking ground, and some of it was taller—was out of the ground probably two or three inches.

Q. If you spray while the grain is still less than, say, three or four inches high, what will that do to the grain?

A. It will come out, usually, with no heads, no kernels in the heads.

Q. In other words, it will damage the grain if you spray it too early? [126]

A. If you put on enough, it would actually kill the plant itself.

(Testimony of Lester Liston.)

Q. But if you wait too late, then the weeds are too big to kill; is that right?

A. Well, at the time I was down there in July it was certainly too late.

Q. In other words, there is a period of time there that requires the exercise of some pretty close judgment as to the relative strength of the grain and the weeds; is that right?

A. That is right. If your grain gets what we call the jump on the weeds and gets ahead of the weeds, why, you have a pretty good condition. If the weeds get ahead of the grain when they are still quite small, then that is a difficult condition, particularly with that type of weed.

Q. Then there isn't much you can do about it; is that right?

A. Well, it is a poor condition.

Mr. Kester: That is all.

Recross Examination

By Mr. Tonkoff:

Q. Mr. Liston, you said you observed some of the grain was not too healthy. Was that on account of lack of spray or lack of water?

A. Well, I don't think I quite exactly said that. I said it didn't appear to me to be too healthy, but that is not my business particularly, and the reason I didn't go into it was because it was none of my business.

Q. Didn't you observe the ground where it was, whether it was moist or not?

(Testimony of Lester Liston.)

A. Well, I didn't dig into it, as I remember. The surface of the ground would usually appear to be dry unless you dig into it, dig down. If the ground is wet, then you will strike moisture within an inch or so of the surface.

Q. In your opinion, it was one way or the other, either a lack of water or too many weeds?

A. Then you also have several other factors that enter into it. But what it was I don't know. There was frost that year, there is an alkali condition in that ground, and there is several factors. I wouldn't attempt to say what it was.

Q. Is that the first time you had ever been on that ranch? A. That is right.

Q. You say you noticed alkali out there?

A. Alkali soil.

Q. But you didn't notice dryness of the crops?

A. Well, as I say, I don't remember whether—it wasn't wet, as I recall, but I didn't dig into the soil. I just noticed the state of the grain and the state of the weeds. When we saw the grain, it was at the stage where we couldn't possibly have sprayed it without damage. Then I didn't look into it any further. [138]

Mr. Tonkoff: Thank you. That is all.

Mr. Kester: Thank you.

(Witness excused.) [139]

CLAY BARR

one of the Defendants herein, was produced as a witness in his own behalf and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Kester:

Q. You are Clay Barr, who is a defendant in this case? A. Yes.

Q. Where are you living right now, Mr. Barr?

A. Living in Portland.

Q. Where has your home been, generally speaking?

A. Until quite recently I have been on a ranch in Eastern Oregon, a wheat ranch in Eastern Oregon.

Q. Where was that?

A. The post-office address was Mikkalo.

Q. How long were you on that place?

A. Three years.

Q. What has been your experience generally in farming?

A. Oh, I was born and raised on a farm and did just about everything there was to do around one.

Q. Have you been farming most of your life?

A. All my life.

Q. What different types of farms have you lived and worked on?

A. Oh, stock and grain and a little irrigation.

Q. In what different parts of the country have you done [140] farm work?

(Testimony of Clay Barr.)

A. I was raised in the southern end of Whitman County in the State of Washington as a kid, and was in that territory until about '49. Since then I have had experience on land in Montana, Oregon, as well as this place in California.

Q. How did you first become acquainted with the Meiss Ranch?

A. The first time I became acquainted with it a real estate man took me down there to see the property along in 1948. He was trying to sell it.

Q. What was the next time after that that you were on it?

A. I was on the place in 1951.

Q. How long were you there that time?

A. We was just in there for an observation of the place through one day each time.

Q. When was the next time you were down there?

A. The next time I was on the place was when I was negotiating for a lease on the place in May of 1953.

Q. How did you happen to be negotiating for a lease at that time?

A. Mr. Hofues and Mr. Kirschmer contacted me to take it over.

Q. Did they express to you any reason for wanting you to take it over?

Mr. Tonkoff: That is immaterial. That is objected to, your Honor. [141]

The Court: He may answer.

(Testimony of Clay Barr.)

A. For the present dissatisfaction in which it was being operated.

Q. Who was operating it then?

A. It was my understanding that Mr. James Stevenson, Jr., was managing the place for the owners.

Mr. Tonkoff: His understanding is objected to, your Honor.

The Court: Overruled.

Mr. Kester: Q. After they asked you to take it over what did you do?

A. In a few days—I don't know just how many from the time that they approached me—I went down to the place, down to Klamath Falls and on down to the place, for an inspection of it.

Q. About what date would that be?

A. I went down about the 5th of May, on the 5th of May.

Q. Who was with you at that time?

A. My father and Perry Morter.

Q. What did you do? Did you go out on the place?

A. Yes. We set up a tentative agreement in Klamath Falls of the working conditions which I would work under, and then went out to the place.

Q. Did you all go out to look at it then?

A. Yes. Well, I say all of us. Mr. Hofues didn't go out. [142] Mr. Kirschmer and the boys that was with me.

Q. When you examined the ranch at that time,

(Testimony of Clay Barr.)

would you tell us the conditions that you found there.

A. Oh, in the fields on the southeast portion, the grain, approximately 650 or 700 acres in that field was all seeded.

Q. Pardon me. Would you point to the areas there as you describe them.

A. Well, yes. This is the county road here, going out into the field right here. And this entire section right in here, which runs just something under 700 acres, was all in grain.

Q. Is that the area that has been referred to here as the weedy patch? A. Yes.

Q. That had already been seeded when you first saw it?

A. Yes, that had already been seeded.

Q. What was the condition of the soil there at that time? A. Very wet.

Q. Was there water standing on it?

A. At the time we first went down there and looked at it that day there was not actually water standing on the ground, no.

Q. Now what other areas did you examine and what condition did you find?

A. We examined the entire ranch; that is, the grain part of [143] the ranch. As you go on to the west side over there, there was an area seeded along this edge, from this center canal along this edge down here, that had already been seeded.

Q. What was that seeded to?

A. Barley. And they were working in this field,

(Testimony of Clay Barr.)

as referred to as the dobe ground, this approximately 400-acre field up here, at the time with their equipment.

Q. Who was working up there?

A. The men that Mr. Stevenson had working for him.

Q. Were they planting up there?

A. They was seeding. I think there was one rig harrowing, another one seeding, and one disking.

Q. What was the condition of other areas?

A. In this area right here there was a little patch on the high ground across the ditch——

Q. That is in the southwest corner?

A. In the southwest corner—that was also seeded. I don't know the exact acres in that piece there, but I call it someplace between 40 and 50 acres.

Q. What was that seeded to? A. Wheat.

Q. What else had been done?

A. That was all the ground that was seeded at that time. When I was there they were working this potato land. The people that had it leased was leveling it so that they could irrigate for seeding.

Q. What was the condition of the area north of the cross-ditch?

A. You are speaking of the cross-ditch running east and west here?

Q. Yes.

A. An area on the east side of it here had been fall-plowed, approximately six or seven hundred acres in there, and it was just too wet to do any-

(Testimony of Clay Barr.)

thing at all with at that time. Between that and the dobe ground in here they had seeded a bunch of oats in there late, and then they had never ripened, and they rented it out for sheep pasture. It was uncut.

Q. You are referring to the prior year?

A. Yes, that was the prior year. That was the condition of the ground there. The crop had growed up, but the sheep had just tromped it down.

Q. It was very heavy stubble, I suppose?

A. Extreme heavy stubble. It had growed big.

Q. What was the condition of the ditches at that time?

A. In what we refer to as the weed patch out here there was a drainage ditch, a cross-drain ditch, comes through the middle of it both ways, parallel clear across the field. That was just literally full of weeds out there. There was weeds on the other ditch, and that slid and caved into the ditch in numerous places. [145]

Q. Up on the dobe ground what was being done there as to how the seeding was being done? What preparation, and so on, was made up there for the seeding?

A. Well, I would say they practically wasn't making any preparations from a farmer's standpoint. They was pulling a light disk over that ground, seeding it and harrowing it, was all that was being done. (Short recess.)

Mr. Tonkoff: We offer the deposition of A. G. Kirschmer, taken by the defendants at Amarillo, Texas, on the 5th day of January, 1955; the deposi-

(Testimony of Clay Barr.)

tion of Horton Herman, together with the exhibits attached thereto, taken on the 30th day of September, 1955, at Spokane, Washington; and the depositions of Clarence F. Enloe, Mary E. Noakes, James H. Noakes and J. R. Ratliff, taken on the 7th day of October, 1955, at Klamath Falls in our case in chief.

The Court: Admitted.

(The depositions above referred to, together with the exhibits attached thereto, having been heretofore filed in the above cause, were received in evidence.)

Mr. Kester: Q. At the time you observed the seeding operations on the 7th of May what was the condition of the seeding? [146]

A. That they had been doing?

Q. That they had been doing, yes.

A. On the dobe ground where they was actually putting it in they wasn't making any seed bed. They was cultivating the ground so little that the last year's stubble was still standing straight up on it, and the seed was—a lot of it was lying on top of the ground.

Q. Were they doing anything about that?

A. That is where they was harrowing over after the drill and trying to cover it up.

Q. They were running a harrow after the seeding? A. Yes.

Q. Is that a normal seeding process?

A. Most generally if they had press drills there you would do any work ahead of the press drills.

(Testimony of Clay Barr.)

Q. How much of that dobe ground was seeded before you got there?

A. Before we went down to take over?

Q. Yes.

A. At the time we went down, actually went down and took over the operation, they was still seeding up here, and they had it all seeded except a chunk up here in the extreme west side of 60 or 70 acres, or such a matter.

Q. About how many acres up in that dobe ground did they seed?

A. They seeded it all. [147]

Q. About how much did that amount to?

A. Oh, they are claiming 400 acres in there, and approximately 60 or 70 acres there was never seeded.

Q. When you were down there first on the 7th of May what was the condition of the lake and water in the lake?

A. At the time we went in to make our inspection of the place it was a windy day. We was there two days. One of them was a windy day, and I hiked up and down along the dike there, and the wind was blowing the waves clear over the top of the dike.

Q. Was the lake level clear up to the top of the dike?

A. In places it was, and the waves was going clear over.

Q. Now up to that time, by the 7th of May, how much ground had already been seeded?

(Testimony of Clay Barr.)

A. I would estimate maybe 1200 acres.

Q. Where did those 1200 acres lie? Can you show us?

A. They seeded this chunk in here I referred to as just under 700 acres. That was the weed patch, that entire area. And they seeded all of this 400 acres except what was summer-fallowed. They seeded a strip down along the west edge of the field that the potatoes was in, and they seeded this chunk of wheat.

Q. The wheat in the southwest corner?

A. The southwest corner.

Q. That comes to around 1200 acres? [148]

A. I just roughed it off there in my mind, about 1200 acres.

Q. You spoke about the ditches being clogged with mud and weeds, and so on. How can that be corrected or when can it be corrected?

A. Well, your correct time was there—any ditches the cleaning, regardless of what is in it, has to be done in the fall of the year when it is so you can get out there with a dragline and scoop them out before the rains set in.

Q. A dragline is heavy equipment that would take dry ground to operate on?

A. Yes. It would mire down in the spring of the year, during the wet season.

Q. At that first visit there did you have any discussion with Mr. Kirschmer about the relationship that he had with Bud Stevenson?

A. Yes. We arrived at a plan for the lease, a

(Testimony of Clay Barr.)

percentage basis, and he was to pay all the bills that would derive from it. And then he brought up the question there that Bud Stevenson was managing the place——

Mr. Tonkoff: I object, your Honor, to any conversation with Mr. Kirschmer concerning Mr. Stevenson not in his presence.

The Court: Overruled.

A. And I asked for him to remove Mr. Stevenson from the [149] place. He informed me that he had a written agreement with Mr. Stevenson in which he couldn't remove him from the place, and I would have to get along with him.

Mr. Kester: Q. Did he tell you what that agreement was?

A. He told me approximately that he was getting \$500 a month and expenses and a percentage, I think was the way he put it.

Q. Now, was there any agreement between you and Kirschmer about the relationship between you and Bud Stevenson after you came in? That is, what were you supposed to do so far as Stevenson was concerned?

A. He informed me there at the same time of the different agreements and leases on the place; that Noakes had part of it and Mr. Stevenson, Sr., had part of it for pasture; there was potato leases out, and there was Bud Stevenson's agreement, and I had to get along subject to all of their leases.

Q. Was any arrangement made for paying Bud Stevenson?

(Testimony of Clay Barr.)

A. Yes. We discussed the wages that he was to get, and there was quite a conversation about it, and we arrived at a compromise agreement that I was to pay Bud his \$500 a month and he would take care of the percentage end.

Q. Kirschmer would take care of the percentage end?

A. Yes, Mr. Kirschmer would take care of whatever percentage basis——

Q. Did you, in fact, pay Bud Stevenson's \$500 a month to him? [150]

A. Yes, I did.

Q. Did you have any understanding with Kirschmer about what work Bud Stevenson would do after you were there?

A. He was supposed to work with us, get along, and we tried—I put in then for him, when he was going to be there, to look after the water and the ditches, was all I asked for him to do.

Q. Did you discuss all that with Bud Stevenson?

A. No, I discussed that with Mr. Kirschmer.

Q. After that did you have a discussion with Bud Stevenson about what he was to do, and so on?

A. From time to time I had a few conversations with him, trying to get him to go out and clean out some weeds out of the ditches and a few things for drainage.

Q. What was the situation as between you and Bud Stevenson with respect to who was boss? Who was in charge there?

(Testimony of Clay Barr.)

Mr. Tonkoff: I don't think that is material, your Honor. The contract speaks for itself.

The Court: Overruled.

A. He was actually over me because he says his contract was written ahead of mine. I was last because I come in last.

Q. Is that the way it worked out?

A. That is the way it worked out, yes.

Q. What about Bud Stevenson's living arrangements there?

A. I put in to get living quarters there, but it didn't [151] work out that way. I was unable to do it.

Q. Did Bud Stevenson stay on in the ranch house?

A. Yes, he stayed on. I put in for him to get an apartment in town and travel back and forth so I could move in there, but it didn't work out that way.

Q. Was there more than one ranch house for a family to live there on the place?

A. Yes, there was two ranch houses on the place.

Q. Who lived in those?

A. There was Bud Stevenson and his family lived in one, and there was a cook on the place lived in the other one.

Q. Where did you live when you came in?

A. I lived in the bunk house with the men.

Q. Were you able to bring your family down at all?

A. No, I couldn't.

(Testimony of Clay Barr.)

Q. Was there any place for your family to live in?

A. No. All we had was the bunk house where all of us stayed together.

Q. Where did your family stay, then, during that summer?

A. They stayed on the ranch up at Mikkalo.

Q. Up here in Oregon?

A. Yes, Northern Oregon.

Q. As a result of that initial conference did you enter into a lease with Hofues and Kirschmer?

A. Yes. [152]

Q. I will ask you to look at this document and tell us if that is the original signed copy of the lease.

A. Yes, that is the original lease.

Mr. Kester: I offer it in evidence.

Mr. Tonkoff: No objection, your Honor.

The Court: Admitted.

(The lease referred to was thereupon marked and received in evidence as Defendants' Exhibit 14.)

Mr. Kester: Q. After the lease was signed then what did you do?

A. The lease was signed on the 7th of May, and I immediately went home to start preparations to come down and take over the property.

Q. Did you still have your ranch in Oregon?

A. Yes.

Q. What arrangement did you make for taking care of that while you were down in California?

(Testimony of Clay Barr.)

A. There was hired help on that entirely while I was down there.

Q. You said your family stayed on the Oregon ranch?

A. My family stayed up there, yes.

Q. When did you come back down to the Meiss Ranch?

A. I came back down on, I think it was, the 9th.

Q. The 9th of May?

A. Yes. I won't swear for sure on that. The 9th or 10th, [153] along there.

Q. When did you actually take over whatever your operation was on the ranch there? When did you start in?

A. About the 11th.

Q. When you came down did you bring any other help with you?

A. Yes, I brought several.

Q. Will you tell us who they were.

A. I brought Harold Morter and Perry Morter, and a man by the name of John Kopp, that I can recall at present.

Q. Were they all experienced farmers?

A. Yes; yes, they was all experienced help.

Q. Now had Stevenson already had a crew of men there earlier?

A. Yes.

Q. Did some of those stay on?

A. Some of them stayed on and some of them left.

Q. How big a crew did you have to start with when you took over on the 11th?

(Testimony of Clay Barr.)

A. Oh, I would have to count them up. I think there was about ten of us besides myself.

Q. Did that include Bud Stevenson?

A. No.

Q. Did Stevenson have any people working for him besides the ones you have already counted?

A. No. [154]

Q. Now when you came back and started to work around the 11th of May what was the condition of the ranch at that time?

A. It had rained, rained heavy at that time, and out in here, in what we was referring to as the weed patch, there was part of that that there was water laying right out on top of the ground on that piece there.

Q. What was the weather condition from that time on?

A. Most of it was rain and snow, rain and snow both.

Q. How long did it continue to rain and snow that spring?

A. It carried on until the 10th or 15th of June, somewhere in there.

Q. During that first month you were there did it rain and snow pretty continuously?

A. Very continuously, yes.

Q. What did that mean as far as your working the place was concerned?

A. When it was raining and snowing it just shut us down. We couldn't work.

(Testimony of Clay Barr.)

Q. What type of work did you attempt to do during that time?

A. We was working on odd jobs, such as fixing up machinery that we was going to be needing for the coming season, whenever possible.

Q. Did you try to plant during some of that rainy weather? A. Yes, we tried.

Q. What happened? [155]

A. Well, one time we had three tractors mired down out there all at once.

Q. Were you able to get them out?

A. Yes, we took another tractor and used a long cable.

Q. How much equipment was there on the place in the way of machinery?

A. Speaking of the largest articles, there was four tractors, there was four combines, there was five trucks, one set of drills, one set of disks, one heavy disk plow, or Gobel plow, I should say, and some harrows.

Q. Did you bring down any additional equipment or obtain any additional equipment?

A. In the spring and through the spring work there all we brought down was some harrows. The harrows on the place was completely wore out, and in order to do a decent job harrowing I sent one of the boys clear back up to Oregon to bring some down.

Q. From your ranch in Oregon?

A. Yes.

Q. Were you able to get some planting done dur-

(Testimony of Clay Barr.)

ing this wet weather in May and early June?

A. Oh, yes. Whenever it would dry off in the least bit to where we wouldn't mire down we would work day and night.

Q. Did you plant at night?

A. Yes, we planted at night. [156]

Q. How did you do that?

A. Put lights on the tractors.

Q. Was that part of the regular equipment of the tractors?

A. Yes. They was in the shop there. We had to mount them and put them on.

Q. What preparation of the soil were you able to make during that wet weather? That is, what was involved in the seeding process?

A. You mean what all we did before we seeded the ground?

Q. Yes.

A. Of course, during the extreme wet weather we was unable to work at all, but whenever we could we used different articles. We used a light scratcher first to try to drag through the ground and open a little bit so it would dry out. But, first of all, we had to burn all the stubble off before that. Then we would run something light over it there, and then we would use disks on the different types of soil. There would be one place you could do one thing and another place you could do another. Some places you could use a big heavy disk. Other places you used a light disk. Some of it we moldboarded. We even moldboarded a little of it.

(Testimony of Clay Barr.)

Q. Did your drain ditches function well at that time in draining off the water?

A. They was functioning, but mighty slow on account of the weeds. It would seep through the weeds, you know, and get [157] out eventually, but it was awful slow.

Q. Did you keep the pumps going pumping water out of the main drain ditch up into the lake?

A. Yes, we kept them going. We could pump it out as fast as it could get to the pump, but it was so slow working out of the land to get over to the pumps.

Q. Was there anything that could have been done at that time to speed up the drainage in the ditches?

A. No, you couldn't get a dragline in—the ditches was so deep you would have to use a dragline to clean them out, and if you put a dragline out there you would just mire it down.

Q. You spoke of some tractors being mired down while you were doing some planting with them. What do you do to combat that?

A. At the time that we went down there, when I first went down there to take over, I stopped in Klamath Falls and talked to Mr. Stevenson, Sr. He advised me that it was such a wet, late spring that there was what they called paddles—they was 4 by 4 wooden pieces that you would bolt onto the tracks and that would just about double the width of the track of the original tractor. We put those on at times.

(Testimony of Clay Barr.)

Q. Did you put them on immediately after talking with him?

A. No. I went in—I also asked Bud Stevenson about it and told him what Mr. Stevenson said. He informed me that [158] that was just an old-fogey idea the old man had and it wasn't needed.

Q. Did you then delay putting on those boards?

A. We did. We delayed it approximately a week.

Q. Then when you finally put them on, what did you find as to the operation of the tractors?

A. Well, just as an example of what we found, one rainy day when we wasn't able to do anything else we put them on one tractor and we went out in the field out there, and one of the boys hooked onto the drills with the tractor without them on and immediately got stuck, and we took the other one over there with them on and hooked onto the drills and he pulled it right on out.

Q. Then did you go ahead and use those paddles on the tractors?

A. We immediately put them on the second tractor then and used them from then on out.

Q. Can you give us an idea of how much time was lost during May and early June because of the weather in your planting?

A. Through from the time we got there until the end of the planting season?

Q. Yes.

A. I would say that there was over half of it.

Q. Half of it that you couldn't work?

(Testimony of Clay Barr.)

A. That we wasn't able to work at all. [159]

Q. When did you finish the planting?

A. Around the 8th or 9th of June.

Q. Did you go back and re-seed any that Stevenson had seeded before you got there?

A. Yes. We re-seeded not too large an amount, but some.

Q. Where was that?

A. That was on the west side of the place, down along this dike here in the lower end. We re-seeded a portion of that.

Q. That is east of the dobe ground, is it?

A. That is south. The dobe ground is practically north there. This is clear down south, in the southwest corner, where that little chunk of wheat was down there.

Q. You mean the southeast corner?

A. Southwest.

Q. Oh, pardon me. I am sorry. You are right. Now, did you have any discussion with Mr. Stevenson, Sr., about watering the grain?

A. Yes. I asked him one day there in the ranch yard, right on the place there, about watering the grain.

Q. What did he say?

A. He said all this bottom land, old lake bed, that took in the biggest share of it here, he said, "This is a late, wet spring." He says, "Keep the water off of it." He says, "It will start second-growth and stall your harvest off." [160] He says, "You are liable to get second-growth up in there,

(Testimony of Clay Barr.)

and if you get early rains in the fall," he says, "it is possible that you may never harvest part of it." He also said on this dobe ground along this side, he says, "We did water a little of that in different places from time to time, and you could put some up there, but be sure and not let it get down into any of the bottom ground."

Q. Would you describe that dobe ground so far as any preparations for irrigation were concerned.

A. The only preparation that had been made for irrigation was at the end of this east-west ditch here. They had a pump put in there and a pipe to boost it up approximately a third of the way across this 400 acres. At that point they would just take and open the ditch and they would run it out one way or the other, and then they would just plug the ditch up and run it over the side and let it run a while, and move it down and run it over again.

Q. Had any of that ground been leveled or graded for irrigation?

A. The only part of that property that had been leveled or graded for irrigation was up in here on this chunk that wasn't seeded at all, that they had seeded into alfalfa with the intention of trying to get some irrigation from this upper well up here. There wasn't none of that in crop that had been leveled or smoothed, to my knowledge. [161]

Q. Would you describe what you could do in the way of irrigation in that dobe ground in view of the condition of preparation there.

(Testimony of Clay Barr.)

A. Well, you could pump it up onto this, into this first ditch. Your water come in out of the lake over here. You would let it back into this ditch, and it would come across to this pump here and you could pump it up there. And, as I say, you could run it both ways from that in a little ditch and just plug it up and let it run over for a while, and then you could move down the line a ways and plug it up again and just let it run back downhill towards your bottom land. You also could take it from that pump in an open ditch back down and run it along another small ditch and down along this canal on the extreme west side of the field the potatoes was in, and do the same thing, letting it run off.

Q. Now, would there be any way of controlling the water once you pumped it out of the ditch to get an even spread of it?

A. I don't know just how you would do it. You could get out there with a shovel and dig a few ditches to run it here and run it there, to try to divide it a little bit, but it was very unsuccessful.

Q. Did you have any discussion with Mr. Stevenson, Sr., about spraying? [162]

A. Yes.

Q. What was that?

A. I asked him about spraying, and he told me that there had never been any spraying did on the place; that this piece that had weeds in it over here had went to weeds the two last years they had raised crops there, but if the weather conditions permitted he would recommend spraying.

Q. Now, when you first came down and were

(Testimony of Clay Barr.)

starting to seed what did you do as far as any more seeding on the dobe ground was concerned?

A. I stopped seeding immediately on the dobe ground.

Q. Why was that?

A. This ground down in here was your good land, the bottom lake land. That was where your production of your ranch was concerned. It was late, and that was the ground that needed the care to get the crop into. This dobe ground up here wasn't going to produce you but very little, it was plain to see right at that time, so we allowed no more seeding there.

Q. You mean you concentrated your efforts on the other?

A. Yes, keep all your efforts down into the good land.

Q. What did you do then with what was left of the dobe ground that had not been seeded?

A. After we had completed our seeding we went back up and plowed it up to keep down the weeds and wild oats and things [163] from growing.

Q. Was there much wild oats up in that part?

A. There was a lot more wild oats than there was tame.

Q. Would you indicate the area where the wild oats were thickest?

A. It took in the entire 400-acre field here, that the wild oats was on.

Q. Is there anything you can do about those wild oats?

(Testimony of Clay Barr.)

A. Yes, you can cultivate them out before you seed.

Q. If they are not cultivated out before you seed, then is there anything you can do?

A. No, there is nothing you can do. There is no spray that you can use on wild oats without killing the tame grain.

Q. About how many acres were in that patch that was summer-fallowed up in the dobe ground?

A. Between 60 and 70 acres, I would estimate.

Q. And the rest of the 400 acres, then, had all been planted before you got there?

A. Yes.

Q. Now, you spoke about re-seeding some ground that Stevenson had seeded west of the potatoes there. What was the reason for that?

A. The rains and the snows and the wet weather had soaked in on that there and flooded it out. It came up, but the ground was so wet that it killed the grain. [164]

Q. Where did you do that re-seeding?

A. That was the last seeding we did. We went back and re-seeded that corner down there.

Q. After everything else was done?

A. Yes.

Q. Did you have a commercial sprayer out to look at the place? A. Yes.

Q. Will you tell when and what occurred.

A. He came out to solicit work, Mr. Liston, about the middle of May, or such a matter, between the 15th or 20th of May, or along there someplace.

(Testimony of Clay Barr.)

At that time, why, it was too wet and too early to be doing any spraying. The grain wasn't ready. So I told him I would get in touch with him later.

Q. Did you get in touch with him later?

A. I did.

Q. What happened?

A. I phoned him around the 1st of July, or the last few days of June, or something on that order that I would like to have some spraying done. He come down and took a look at the amount of ground he would have to cover.

Q. What happened then?

A. He came down and we went out and went over the biggest share of the place where we was able to drive with an automobile. First of all, we went over what was the bad weeds in [165] that complete section of ground there, and we tromped around over it all afternoon looking at it. The weeds was so bad and the grain was up so poor in there all the time that the weeds had got ahead of the grain. The weeds was up bigger than the grain. And at that time the grain, as he explained to me—he took off part of it and explained it was just starting into the boot stage. He said, "If you put on enough spray to kill those weeds you would never harvest any of the crop. It would kill the head."

Q. You spoke of the grain being sick there. What was the matter with the grain?

A. It was too weedy, was my opinion of it at the time, along with poor land, alkali condition, and

(Testimony of Clay Barr.)

the extreme wet spring that had kept the grain down, sick and yellow, most all of the spring.

Q. Was there any time during the spring when the grain was healthy enough to stand spraying?

A. It rained along to the 10th or 15th of June there, and there was no opportunity at all. The grain was just very sick and poor, and then when it quit raining it started kind of coming out of it a little bit. And someplace along there a person has to take a guess at what they think might be the right time that you could stand a shot of spray without harming that grain. I took my guess, and he recommended not spraying. [166]

Q. You spoke about alkali in the soil there. Would you describe the condition of the soil on the ranch there in the different areas?

A. Your ranch as a whole there—your bottom land is considered peat soil. All the way along your dikes, clear through, there was an alkali condition come all the way down along it and worked out into this lower field down here, the heaviest spot. Your dobe ground all laid up on the west side. Between where your old lake bed was and up the hill as far as it was farmed, that was dobe.

Q. Now was that dobe ground good grain soil under any conditions?

A. Not in my opinion.

Q. In order to make a crop bear at all what would have to be done in the way of preparation of the soil?

A. I don't believe you could raise a good crop

(Testimony of Clay Barr.)

on it. There might be a chance if you would completely smooth that out and get fresh water for irrigation and dig your ditches, your rills, every three feet down over that and really irrigate it with the recommended fertilizers and one thing and another. Then you might raise a crop. I don't know for sure.

Q. Had that ever been done up to the time you took over the property? A. No.

Q. What would the effect be of soil preparation beforehand, [167] fall plowing and cultivating, and so on?

A. You could raise a fair crop, I would say, maybe, if you would fall-plow that ground, and then in the spring of the year when the wild oats would start if you would get in and cultivate it and work it several times, work out all these wild oats, and build you a seed bed and mulch on top of your ground, and get it down there six or eight inches deep there for your seed to work in, you might raise a fair crop there.

Q. Had anything like that been done by Stevenson before he planted it?

A. In that year?

Q. Yes. A. No.

Q. Down in the so-called weed patch, that 700 acres or so in the southeast part, was that soil really fit for grain at all?

A. I don't think that soil there will ever raise any grain.

Q. Did you make any study of the soils there in

(Testimony of Clay Barr.)

connection with what tests the Government might have made there, and so on?

A. Not before I took the lease. I did afterwards.

Q. Did you obtain information from the Soil Conservation Service about their tests on this soil?

A. Yes. I obtained a map, a soil analysis map, and in [168] there they have figures—I was unable to read them, and I took them to them and had them read them to me.

Q. Is that map that is below there on the board one of those maps?

A. Yes, that is one of them right there.

Q. Would you explain the different colorings there so far as the Soil Conservation Service soil analyses?

A. He told me that this was their map, and they had made it up. Your soil conditions as they show them is 1, 2, 3, 4, and on down the line. Your yellow soil down here, he says, is your No. 2 soil, your red is your No. 3 soil, and your blue is your No. 4 soil. That is the way he quoted it.

Q. Was there any No. 1 soil on the place?

A. No, not according to that map, there isn't any No. 1 soil on the place.

Q. Now, the red area there, does that correspond generally with the land immediately west of the dike?

A. Yes. That is the land that he pointed out that I would find an alkali condition in. It runs all the way along the dike, next to the dike.

Q. This 1, 2, 3 and 4 category, which way does

(Testimony of Clay Barr.)

that go? Which end of the scale is good and which is bad?

A. No. 1 is your first-class land, and so on down the line. The bigger the number the poorer the soil.

Q. Is the No. 4 soil good for anything, to speak of? [169]

A. No, No. 4, he told me, wasn't good for anything.

Q. Now, did you go back and try to re-seed the weed patch area there?

A. No, I didn't.

Q. Why not?

A. I figured it was too late to ever make a crop. If it had been earlier, it was definitely the thing to do, but I figured it was so late that it would never get around to make a crop.

Q. What time was it by that time?

A. That was after we got through seeding the 10th of June, or such a matter, or the 12th, along there.

Q. About how long does it take for a crop of barley or oats to mature down there?

A. I have always understood and read that it takes about 120 days to mature up a crop of oats or barley.

Q. Was that your experience that year?

A. We got in part of it a little bit earlier, but that there was awful close. It would depend a little bit on your condition of wetness as to how fast it would mature along.

Q. Now, from the time you came down there

(Testimony of Clay Barr.)

on the 11th of May how long did you stay there on the place?

A. I was there until the seeding was—until the day before the seeding was over with there. Until the 7th, I should say, the 7th of June, I was gone from the place once. [170]

Q. Just once. Where was that?

A. I drove up one evening to the ranch in Northern Oregon and back the next day.

Q. Then from the time the seeding was over—or, rather, you said the 7th of June. Where did you go on the 7th of June?

A. I went to Spokane.

Q. What was that for?

A. We had a legal argument coming up in court in Spokane and I had to be up there.

Q. Was that the case that Mr. Tonkoff sued you in up there at Spokane?

A. Yes, that is the case.

Q. How long were you in Spokane for that case?

A. I left up there the evening of the 10th.

Q. Was that the occasion on which the settlement was made which disposed of the crop on the place? A. Yes.

Q. Then where did you go from the 10th of June?

A. I came back down and spent the night at my home, and went back down to the Meiss Ranch the next day.

(Testimony of Clay Barr.)

Q. Then how long did you stay at the Meiss Ranch from then on?

A. Until about the 20th.

Q. The 20th of June? A. Yes. [171]

Q. Where did you go from then on?

A. I went back to the Northern Oregon ranch

Q. How long were you there at that time?

A. I was up there the biggest share of the time until the harvest was ended up there.

Q. In other words, you went back to your Oregon ranch to take care of the harvest up there?

A. Yes. We had to get prepared, get the machines and trucks ready, and I went back up there

Q. What period of time did that cover?

A. We started the harvesting along the 12th or 15th of July and ran until about the 8th of August.

Q. Now, between the time when you came back from Spokane about the 11th of June until you went back to your Oregon ranch for the harvest what was the situation on the Meiss Ranch? What was the condition of the crop? What were you doing?

A. What was we doing? We went over on the north side, clear out into the sagebrush over here and this lake that was here, there had been a canal built down north in here, I understood by Mr. Stevenson, Sr., before he sold the place, with the intentions of taking water out to dump on this sagebrush land for the purpose of lowering the lake

(Testimony of Clay Barr.)

for the protection of your levee and flooding conditions on the farm land.

Q. Was there danger during that time that the levee would break? [172]

A. Oh, there was definite danger. There was places along that levee there it was so thin that you walked single file—you couldn't walk side by side—to keep the water from breaking through.

Q. How high was the water in the lake at that time?

A. On a windy day it was splashing over the top.

Q. Then in order to get rid of that excess water what did you do?

A. We went out here and we built a canal approximately 40 feet wide, and took two tractors and bulldozers and we put them in the middle of our canal, and we rooted the dirt both ways, and we would root it up, oh, probably 10 feet high on each side, and left the center about 40 feet wide. We built it approximately a half a mile, clear over to the line fence over here, and we laid in pipe into that down at ground level and let water out on both sides of that canal there, and set a pump in over here for the purpose of pumping it over in there and disposing of the water out over the sagebrush land.

Q. Did that have the effect of lowering the levee and protecting the dike?

A. Oh, yes. Every little bit helped. We was doing everything we could do then to keep the

(Testimony of Clay Barr.)

water down. Mr. Hofues and Kirschmer had two drainage wells dug way over here on the extreme east end, out in some Federal land, to put water down in the ground. And we was wasting water out into the peninsula—what we called the peninsula—whatever it would take. We was doing just about everything we could, to string the water in every direction we could, in order to get the water level down and keep it down.

Q. What was the condition of the crops during that time?

A. The crops around the 10th to the 15th of June, the rains had let up and stopped, and the crops started perking up and looking better.

Q. Did they seem to be coming along all right?

A. They seemed to be coming along pretty fair with the exception of dobe ground. That never did look good, or the weed patch.

Q. Did you keep the pump going to dispose of that excess water up on the sagebrush?

A. Yes, we run that pump steady. I think it ran there for about 30 days straight without being shut off day or night. It was pumping approximately 8,000 gallons a minute out of there. The only reason that it was shut off at that time was we soaked up so much of that sagebrush ground that it was working its way around and coming back to the lake again.

Q. During that time was there any lack of water down on the cultivated ground?

A. No; no, there wasn't.

(Testimony of Clay Barr.)

Q. Did you look around from time to time to see what its condition was? [174]

A. Yes, I was down there every few days looking around.

Q. What was the condition of the soil in the bottom land there?

A. The bottom land around there had plenty of moisture. You could go out there any time through the summer there, clear up until harvest, and just kick your toe into wet dirt.

Q. What was the condition up on the dobe ground?

A. That got dry along towards summer.

Q. Did you do anything about it getting dry up on the dobe ground?

A. Along about the 1st of July Mr. Herman of Spokane phoned me—I don't know, but I say that was approximately the 1st of July; I don't know the date—he phoned me and told me that Mr. Tonkoff had called him saying there was needing to be some irrigation done up on that high ground.

Q. Pardon me for interrupting. But at that time where were you?

A. I was up at Mikkalo.

Q. That was in connection with the harvest on the Oregon ranch?

A. Yes.

Q. Go ahead.

A. I told him there was only one thing to do, and that is for all of us to go down and take a look if they was in doubt. I told him to make a date to see if they couldn't all get together and go

(Testimony of Clay Barr.)

down and to call me back, which he did the next day. He told me that Mr. Tonkoff was going to fly his airplane over to Arlington, and that he was unable to come along, and to go down and size the situation up and see what we thought about it.

Q. Did you do that? A. We did.

Q. Who all went and how did you go?

A. When I went down to Arlington there and met Mr. Tonkoff, Mr. Welch was also with him, and the three of us flew to Klamath Falls.

Q. You flew in Mr. Tonkoff's plane?

A. Yes.

Q. Then what did you do?

A. We got us a ride out of Klamath Falls there with a man I knew and went out to the ranch out there that evening. That evening there he and Mr. Welch and Bud Stevenson went out and they went all over the place that evening. I also went all over it but with the man that I had got the ride out from Klamath Falls with. I was showing him the crops and the ranch where I had the lease, and I went all over it there, but I didn't go with them. The next morning Mr. Tonkoff came to me alone, and he said, "What do you think about the irrigation out there?" I said, "Well, let's jump in the pickup and we will go out." And we did. We went into the field and turned down along the south side of the ranch, along the potatoes there, and went up the west side—yes, went up the west side—and we stopped in a couple of different places along there, and we walked out into it and kicked down

(Testimony of Clay Barr.)

into the soil there a couple of inches. It looked dry on top, but underneath there was moisture. His remark was that it didn't look too bad.

Q. Whose remark was that?

A. Mr. Tonkoff's. He and I was alone.

Q. Just where was that?

A. That was in a couple of different places, oh, along on the west side of the field that the potatoes was in. We then went up to the pump up here on the dobe ground and in this 400 acres there. He says, "What about this?" He says, "This is looking dry here." He says, "There is a few little cracks in here starting," he says. "Isn't that dry?" I says, "Yes, it is dry, but," I says, "let me explain about the means of operating this place for water." I said, "The only water you have available under my portion of the place, on instructions from the landlord, was to use the lake water if I wanted to do any irrigation, for the simple reason the wells was assigned over to the potatoes and the pasture, and they was afraid that if there was any shortage of water they would get into a law action with them and they directed me not to use it." So I said, "You can draw the water out there, and you can bring it across here to this pump and you can pump it out on top of this ground and you can let it go," I says, "but you don't dare let any of it get down into this bottom land down here, into the good lake bottom." And he said, "Well, how about it? Don't you think we ought to try a little of it?"

(Testimony of Clay Barr.)

I says, "Yes, I will try a little of it, but I won't guarantee you I am going to irrigate that land at all." And I says, "What's more," I says, "if you and Mr. Welch and the rest of them are interested in this—or dissatisfied in the way I am operating this place, give me the expenses I am out from June 10th on and you take it over." He says, "No, no. You are doing fine. We don't want nothing to do with it."

Q. That was Tonkoff that said that?

A. That is Tonkoff that said that.

Q. All right.

A. We then got in the pickup and we drove out through that middle dike and came down along the weed patch, at which time he never said anything about weeds, after I told him he could take it over.

Q. After that time did you ever have any conversation with Tonkoff at all about the condition of the ranch? A. No.

Q. Did he ever make any complaints to you at all?

A. No, he personally never made any complaints. I got a complaint around harvest time which was his complaint, but it didn't come from him. Mr. Herman called me and wanted to know why we wasn't starting harvesting, something after the 1st of September, and I told him that it was simple; it just wasn't quite ready.

Q. Now while you were gone up in Oregon to

(Testimony of Clay Barr.)

attend to your harvest on the Oregon place what arrangements did you make for the care of the Meiss Ranch while you were gone?

A. I went back over to Bud before I left out there, and I approached Bud—I had a man down there all the time——

Q. Who was that?

A. A man by the name of Jeff Williams.

Q. All right. You approached Bud?

A. And I approached him on going in and cleaning out this ditch; that the mud was in the ditch here so high that it would have to be cleaned out before the water would come from the lake over there, in order to keep it off of the land out here further, and start the pumps so he could be doing a little irrigating along there. And I also told him I would be back down in a week or so with another man to help us with it and see what could be done.

Q. After your conversation with Tonkoff when you were talking about water, and so on, did you do anything about putting water on the dobe ground?

A. When I came back down then—— [179]

Q. By the way, when did you come back down after that?

A. It was around the 12th to the 15th, somewhere along there, of July when I came back down.

Q. All right. What did you do then?

A. I brought down Perry Morter with me, as

(Testimony of Clay Barr.)

I agreed to do, and we went out and we went all over it. Bud did what he said he was going to do. He cleaned out that ditch there just enough to get the water over to the pump, and then he and my man was watering along through there in different places. They watered all the way down along this road where the field is that the potatoes was in. Then they watered—as I say, they pumped it up here about a third of the way, and they had been running it out both directions at that time. And we went all over that, the two of us. We tromped out in there and we found as we tromped out in there that watering this hard ground was just like dumping it on this floor; it would just go over into a little low spot and run off down into the land where you didn't want it. Where the water was running at the time, we went down there and we walked out into it, and it was down into that low land, and we tromped in water there six or eight inches deep that was in the low swale out there.

Q. This was what time of the month again?

A. About the middle of July. We went over where they had been watering and the water had gone too far down and worked [180] into the good ground. And the mud there was up to your shoe tops out in there. So we talked it over and kicked it around this way and that, what we thought was the right thing to do, and we made the suggestion that maybe they was leaving it in one place too long; they wasn't moving it often enough. So I left him in charge there to go ahead and try it,

(Testimony of Clay Barr.)

keep moving it, spread it and work it along there, and to call me the next day.

Q. Pardon me. Who is this that you are referring to?

A. Perry Morter.

Q. Perry Morter. Go ahead.

A. — and to call me the next day. So he did. The next day he called me there and told me that you couldn't turn the water out fast enough, you couldn't move the water fast enough to keep it from running down to that land, so I told him to shut it off.

Q. Now during the summer there did Bud Stevenson do anything towards helping run the place? A. Very little.

Q. What did he do?

A. About all he did there for me, for my assistance at all, was clean that one ditch out there a little bit for 50 yards with the dragline and start that pump so my man could be watering. He helped get water around for the potato man and maybe helped on the pasture for water. I don't know.

Q. Did he do anything on the grain part of the place aside from that one job of cleaning out the ditch and turning on the pump? A. No.

Q. What was your relationship during the summer there between you and Bud? How did you get along? A. Well, not too satisfactory.

Q. What was the difficulty?

A. Oh, the feeling of it was there that I butted

(Testimony of Clay Barr.)

in there and kind of knocked him out of a good job, I guess, and he was sore about it.

Q. Did he cooperate with you at all during the summertime except for that one job? A. No.

Q. Now that time that you brought Perry Morter down did you go out and look around the weed patch there, too?

A. Yes, we went all over the weed patch.

Q. What was the condition there?

A. That was after we had recommended—before the spray man said that you couldn't go in and get it sprayed, so we went out to see how much grain there actually was out there. It was thin and poor. In places there wasn't any, and we picked out a patch there that we considered all weeds and no grain, and decided to plow it up to keep down the weed seed from the rest.

Q. Did you plow up some of it? [182]

A. Yes.

Q. How much?

A. Oh, everybody has got their guess on how much we plowed up there, but approximately 100 acres in that weed field.

Q. Now would you tell us all of the ground that was not in grain at the time of the harvest there that was plowed. Tell us the different fields.

A. At harvest time?

Q. Yes, at harvest time.

A. Yes. There was this field in the dobe ground up here that they had planted to alfalfa, and it

(Testimony of Clay Barr.)

had a poor stand on, and we plowed that up, approximately 60 to 70 acres there.

Q. What was the reason for plowing that up?

A. In making summer fallow out of it?

Q. Yes.

A. The reason for that was we didn't have time to give it the proper cultivation. That was robbing good land down here on the dike. By the time we got the good land planted it was too late to go back up and get any crops seeded up there, so we what we call summer-fallowed it.

Q. Go ahead and tell us the other patches.

A. We plowed up a strip on the north side.

Q. Had that previously been seeded?

A. No, that had not been seeded. We left it out from the seeding.

Q. Why? [183]

A. It was alkali land in there under extremely poor cultivation, see, from the year before, and it had a lot of foxtail in it. It would have taken a lot of cultivation and work, and we plowed it up to make summer fallow, figuring that we might stand a chance of getting a good crop on it next year.

Q. All right. Go ahead.

A. And we also plowed a strip just north of the main dike, a small piece. I don't know the acres exact. Also, next to the dike——

Q. Was that alkali ground, also?

A. That is the same deal, yes. And that hadn't

(Testimony of Clay Barr.)

been in—neither one of these pieces here had been in crop the year before at all.

(Thereupon an adjournment was taken until

Friday, October 28, 1955, at 10:00 a.m.)

Portland, Oregon, October 28, 1955, Court reconvened, pursuant to adjournment, and proceedings herein were resumed as follows:

CLAY BARR

one of the Defendants herein, resumed the stand and was further examined and testified as follows:

Direct Examination—(Continued)

By Mr. Kester:

Q. Mr. Barr, there has been put in evidence here a letter which you wrote to Mr. Tonkoff and Mr. Herman advising them of an approximate harvest date. Will you explain the circumstances surrounding that.

A. According to the agreement in which I assigned them my interest in this crop, it called for me to notify them at least ten days ahead of the harvest season—that is, the beginning of harvesting. And I wrote that letter trying to give an approximate date.

Q. At the time you wrote it did it appear that the date mentioned there would be the approximate beginning of harvesting?

A. It could possibly be.

Q. That letter mentions that the harvesting would begin on or about the 1st of September. Did

(Testimony of Clay Barr.)

it look like that would be when the harvesting would start?

A. Yes. It couldn't start before that, I knew.

Q. When did you finish your harvesting on your Oregon ranch?

A. About around the 7th of August.

Q. What did you do immediately after that?

A. We went directly to the Meiss Ranch.

Q. Whom do you mean by "We"?

A. Some of the boys that was working with me also went down and helped with the harvest.

Q. How many men did you take with you from the Oregon place to the California place?

A. There were three men off of the Oregon place went with me.

Q. Did you take down any additional equipment besides what was on the Meiss Ranch already?

A. Yes.

Q. What did you take?

A. A truck and harvester, self-propelled harvester, down there.

Q. A combine?

A. A combine, and three extra trucks, and also went out and rented a machine, a self-propelled combine.

Q. What was the reason for needing extra equipment?

A. Under my terms of the lease I wasn't called upon to use anything but the equipment that was there, but it was a late season, the rain could set in and catch us, and all the machines that was

(Testimony of Clay Barr.)

there was all pull-type machines, had a tractor on, and when you harvest that country down there you have to kind of harvest it as it gets ripe. If there is five acres ripen up, you will harvest that, cut it out and harvest it, or 100 acres, or whatever piece you have ripen up first you will harvest it. You need a pusher to go around and open that up. If you take a combine, a pull combine, there will be with that combine going through—there look at the waste you would have all over around on those pieces.

Q. Just explain how there would be waste from using a pull-type.

A. The tractors and combine wheels just run over it and tromp it into the dirt.

Q. Is that true with a self-propelled combine?

A. No. A self-propelled combine has its header in front of the machine and picks everything up, while your pulling machine has the header onto the side.

Q. So that the use of a self-propelled combine prevents waste of the grain?

A. That is right.

Q. What was the situation about the beginning of the harvest there at the ranch? When did the crop get ripe and what did you do about it? Just tell us about that.

A. We pulled our first machine out on the 8th day of September and started cutting, and we cut out a little bit with one machine, and then as the grain gradually kept getting a little riper we kept

(Testimony of Clay Barr.)

adding a few machines, and had them all running within a week.

Q. Could the grain have been harvested any earlier than you did start?

A. No, I would say that was just a little bit too early then.

Q. Were you ready to start at an earlier date?

A. Oh, yes. We was sitting around there for two weeks ahead of the harvest there, just kind of making work for the men and waiting on it.

Q. What type of work did you do while you were waiting for the grain to ripen?

A. Oh, it was just the machinery and equipment, fixing it up and getting ready, and different things like that.

Q. Now, by the beginning of the harvest was there any new arrangements made about the future operation of the ranch?

A. Yes. The Farnham brothers came in and took over my interest under the lease before the harvest had started, so that as soon as I got the crop off there, why, I was relieved of the duties of the ranch.

Q. What was your arrangement with the Farnham brothers?

A. I sold them my interest in the lease, just as it called for, and they was to take over.

Q. When was that assignment made? [188]

A. I think it was, oh, in the last week of August; something like that.

Q. When was it to take effect?

(Testimony of Clay Barr.)

A. I think it called for October 1st, or as soon as the crop, the '53 crop, was completed—the harvest was completed.

Q. In other words, you were still there during the '53 harvest? A. Yes.

Q. They took over following that?

A. They took over following that.

Q. Did you get the consent of the owners to that assignment of the lease? A. Yes.

Q. Did you have to make a trip in order to do that?

A. Yes, I made a trip to Denver.

Q. When was that?

A. I think I went there about the 5th of September.

Q. And did they consent to an assignment to the Farnhams?

A. Yes, they consented to the assignment.

Q. Then when did you get back from that trip?

A. I got back about the 9th.

Q. Was that about when the harvest started?

A. Yes.

Q. Now, would you explain how the harvest went. You mentioned starting a little bit here and there. Just describe the conditions during harvest there and what you did. [189]

A. Well, your first grain to ripen up was the short crop along the dobe ground. We worked that out first up there, and then we just looked for a piece that was ripe next, regardless of how big it was. You cut around it and harvested it out, and

(Testimony of Clay Barr.)

by the time that was done there would be another piece ready, and so on through the harvest. We left the weeds until last. We cut all the good ground first.

Q. Did you get completely ripe grain from the very start?

A. No. We had to store it in the elevators there, because there was a little too much moisture to put in a boxcar. We double-handled it, what you call it. You put it into the elevators, put it in and dry it out, and take it to town and dump it out of your truck and put it up in another elevator, giving it time to air out and reduce the moisture content in the grain.

Q. How much storage facilities were there on the ranch?

A. I think there was—I don't know exactly, but I think there was about 12 round bins holding about 3,000 bushels apiece, plus a big, flat Quonset storage shed.

Q. What was the first portion of the crop that was harvested?

A. The dobe ground there—or wheat, I should say, was the crop.

Q. Would you indicate on the map the wheat area that became ripe first. [190]

A. I think the first piece was approximately 40 acres that laid on the hill, actually up in the pasture, a little bit above the water line, right in there, which was seeded to wheat.

Q. In the southwest corner?

(Testimony of Clay Barr.)

A. In the southwest corner of the ranch. Then the other patch of wheat was here, just in the southeast corner of the dobe ground. It was 400 acres. And then the harvest moved on over into the oats. The rest of the dobe ground was seeded to oats, and we moved into that.

Q. What kind of production did you actually get off the dobe ground? Can you estimate what the crop was like or describe the condition of the crop at harvest time?

A. There wasn't too much on it. I know we put it all in one of those bins.

Q. One of the 3,000-bushel bins?

A. One of those 3,000-bushel bins.

Q. It all needed to be dried some, did it?

A. Oh, yes. Yes, it was damp.

Q. Then after the dobe ground where did you harvest next?

A. We moved down below the dobe ground and started working in along the edge of this field through here.

Q. That is immediately east of the dobe ground?

A. Immediately east of the dobe ground.

Q. Now from that time on did the harvest move more or less steadily, or was it interrupted? [191]

A. No, we had good harvest weather, and it moved along very steady. We had pretty good dry weather, and we was able to keep all the machines running, and we had a very successful harvest.

(Testimony of Clay Barr.)

Q. You had six combines going, did you?

A. Yes.

Q. Whom did you have for operators on the combines? Were they experienced farmers?

A. I had the best I could find. I went up into this northern country up here, and I got operators that wasn't out looking for harvest jobs. They was men working on big ranches, working the year around. I actually had to go to the men they was working for and get them to let the men come down for me. That was the best that could be had.

Q. Did you operate all six combines at once?

A. Yes.

Q. All the time?

A. The biggest share of the time.

Q. How did you operate with respect to the difference between the self-propelled combines and the pull-type combines?

A. The self-propelled, of course, as I say, always went around to open up the fields first. Then they would either cut themselves off a little piece to work, or sometimes they run right along with the pull machines. [192]

Q. What is the fact as to whether there was any excessive waste of grain in the harvesting process?

A. There wasn't any excessive waste in the harvest fields. You take on any machine when you are harvesting grain you have to set your machine accordingly to save the grain that you are in. I was personally on each and every machine to help start

(Testimony of Clay Barr.)

it out, and I venture to say I think pretty near every day I was out there checking for waste. Most of it is done through the threshing of it. Well, first I should explain that. You run your grain through the cylinder to divide your heads from your straw. That leaves your kernels of your grain and your chaff together. That goes back onto the chute and then you divide it with wind. You put on enough wind to blow that light chaff and trash all out of the grain and leave the kernels, which is heavier, and they drop down through and into an auger and go up to the top of the machine. Now there is always a little bit of question in there that if you put on enough wind to blow all the trash out you lose a few of the light kernels, that is real light. That isn't much damage to you, because there is very little wheat in it. But you will lose a few. If you shut your wind down enough to save those, you are going to get the trash into the grain, and then you will get docked.

Q. By dockage you mean the price goes down?

A. Yes. They will dock you for having trash in your grain. But there was no excessive waste.

Q. Did you personally yourself observe each of these machines?

A. Yes, I was on them with the boys that was running them there.

Q. Did you observe their operation to see whether there was grain coming out onto the ground?

A. Oh, yes. I had straw down my neck every

(Testimony of Clay Barr.)

day of the harvest out there from being under those machines looking for waste.

Q. What about this weed patch that has been mentioned? Will you describe the harvest in that area.

A. The weed patch—I left during the harvest at the time they pulled over into the weed patch, and I wasn't there at the time of the harvesting of that. But I was in contact with them every day.

Q. Pardon me for interrupting, but what time of the harvest was that?

A. That was the last thing. Everything was cut except the weed patch.

Q. Why did you leave that to the end?

A. That had the least grain in it there.

Q. Now, then, would you go ahead and explain the harvest in the weed patch.

A. The harvest there—I told them now that that was a very tough job, and they all knew it. I told them we was going to make an extreme effort to get everything that was humanly possible, and I think everybody will agree with me we did more than was called for.

Q. What do you mean by that?

A. Out there wallowing around in those weeds, when there wasn't any grain to get, just trying to get just a little bit. Because it wasn't our crop. I wouldn't have did it if it had been my crop.

Q. You mean if it had been yours, you wouldn't have tried to harvest it?

A. Loss of time to find these healthy heads,

(Testimony of Clay Barr.)

and there was part of it we harvested that didn't pay for the labor that was out there to get it.

Q. When you are harvesting weeds like that, what does that do to the combines?

A. They constantly plug up. You get a lot of green weeds in your machine, and it grinds up in the elevators and augers. It just plugs the elevators and augers up.

Q. What do you have to do then?

A. Open the elevators and dump it out on the ground.

Q. That stuff, then, that is dumped out. I suppose, is a mixture of grain and weeds and so on?

A. Yes. It depends on just where you was at. Sometimes it would be all weeds; sometimes there would be quite a little grain in it. If there was enough grain in it, the boys would pick it up. If there wasn't too much, why—the biggest share of the time it was mostly weeds and, why, they would just leave it in a pile there.

Q. What would be the effect if a cow got into that mixture of green weeds and grain?

A. That was a serious condition from a cattleman's point of view there. Grain and green weeds ground up together creates a bloating condition, and it is a serious condition.

Q. Did Mr. Stevenson, Sr., run his cattle in there right behind the harvest?

A. As soon as we got out—the pasture was all his—he started to pasture the place as soon as we got our machines out.

(Testimony of Clay Barr.)

Q. How much of the grain did you have to put in bins like you have described for the purpose of giving it a chance to dry?

A. Oh, that would be hard to estimate.

Q. Do you remember how many times you had storage spaces with grain in them?

A. We stored quite a lot of the grain. It sometimes wasn't all due to damp grain. Sometimes we couldn't get boxcars to load out over on the railroad. Instead of holding up the harvest, why, we double-handled the grain by storing it in those bins and then picked it up and hauled it later. [196]

Q. And that increased your operating expense?

A. Oh, yes. Whenever you double-handle grain your operating expenses increase.

Q. You mentioned a storage shed. Did you have occasion to use that?

A. Yes, we used that one time. Just north of the ditch, that main ditch there, why, there was a field of oats out in there that was just—it was pretty green. I took it over and had it tested two or three different times, and they wouldn't take it.

Q. Pardon me for interrupting. What kind of a test are you referring to?

A. Moisture-content test.

Q. By the buyer?

A. Yes, by the buyer. Kerr-Gifford Company bought the grain there, and they didn't want it at that high-moisture content.

Q. All right. Go ahead.

A. It come to a question of either quitting har-

(Testimony of Clay Barr.)

vest and waiting for it, to try to ripen it, and having the danger of getting caught with rains, or doing extra work in drying it. So we cut it and we dumped it over the floor of that big storage shed there so the air could work down through it, and that was later picked up. And even part of that had to be hauled and put through a drier for still having too much moisture content. [197]

Q. Speaking of the crop generally, did you get it harvested as quickly as it was ripe enough to harvest?

A. Yes, we was right on top of it whenever it was ready, and a little bit before, as I say.

Q. Did you have adequate help to do the harvesting? A. We had plenty of help.

Q. Did you have enough men to run the machines that were there? A. Yes.

Q. You mentioned another machine that you went out and got. What arrangements did you make for that extra machine?

A. I rented that. That was Mr. Stevenson, Sr.'s, combine, which wasn't in use that year, and I rented it by the day and paid him cash rent by the day for the use of it, and my men run it.

Q. The assignment to Tonkoff and Herman reserved the sum of \$15,000 for harvesting expenses. Did your harvesting expenses run more or less than \$15,000?

A. I run just a little bit over it.

Q. So you actually had more than \$15,000 in the harvest?

(Testimony of Clay Barr.)

A. Yes. I figured it up, and it was just a few dollars over sixteen thousand, was the exact dollars of it.

Q. Now there has been some talk here about a loss in hauling the grain in to town. Can you explain first what the arrangements were for transporting the grain. [198]

A. On the place there was four trucks equipped for hauling grain that had been used on the ranch for several years. They was all equipped with wooden beds and wooden racks, all factory-made.

Q. Regular grain bodies?

A. Regular grain bodies, and they was good equipment. Mr. Stevenson had good equipment for that. The ones that we brought down, we had a steel tank on one of the trucks and the other two was similar to what he had.

Q. So you had seven trucks hauling, did you?

A. Yes, we had seven trucks around there all the time.

Q. Of which three were provided by you personally?

A. Yes, three of them was.

Q. Now, were those dump trucks?

A. All but the one with the steel tank. That dumped out at the bottom. They all had hoists on them to dump.

Q. What was the process of handling the grain from the combine until you got it loaded? What did you have to do?

A. You mean into the boxcar?

Q. Yes. A. All the way through?

(Testimony of Clay Barr.)

Q. Well, for instance,—

A. Your grain on the combine, of course, is put into a tank on top of the machine and augered out of the bottom of the tank right over into the truck. You just drive a truck into it and dump it in. Then if you haul direct to the railroad he had a pit built into the ground, a concrete pit, that you could drive across the top of and dump it into that pit, and it went up an elevator, a bucket-line elevator, up over the top of the boxcar, up high enough that when it dropped by gravity it would go into the car.

Q. That pit was at Macdoel, was it?

A. Yes, that was at Macdoel.

Q. Was that a part of the ranch facilities?

A. Yes, that was a part of the ranch facilities.

Q. Did they also have scales there for weighing?

A. Yes, they had scales there for weighing.

Q. How long a haul was that from the ranch to Macdoel?

A. It was about five miles.

Q. What kind of a road was it?

A. It was a graveled road and ungodly rough. That is about all I can say about it.

Q. There has been some mention here about grain spilled along the road. Did you observe whether or not there was any unusual amount of grain spilled?

A. Yes, there was. One of the boys on this rough road had his endgate jiggle loose on that

(Testimony of Clay Barr.)

rough road and it slid out the back end of the truck.

Q. About how much was that, do you know?

A. Oh, probably a quarter of a load or a third of a load; something like that. [200]

Q. What would that be in bushels or pounds?

A. Oh, I would say a couple of tons of barley or oats.

Q. Over what distance along the road did this accident happen?

A. Oh, of course, when it first jiggled loose it come out there pretty thick, and the further along you would go, why, the lighter it would get. But it run for a couple of miles.

Q. Aside from that one occasion was there any unusual amount of grain spilled along the road?

A. No. No, there wasn't any.

Q. There has been some reference made here to putting tarps or covers over the tops of the trucks. Were there any such covers available at the ranch?

A. There wasn't any tarps on the ranch.

Q. From what you have been able to find out, had there ever been any tarps used in hauling grain there?

A. No, they are very rarely ever used, especially on a short haul like that over rough roads where you can't get up speed, you know. The only danger of ever losing any grain out of a truck, you know, is if you get out on an oiled highway and get a lot of speed, and the wind will whip it out. On a rough

(Testimony of Clay Barr.)

road you can't get up enough speed for the wind to affect it.

Q. What arrangements did you make for taking care of the harvest crew during the harvest?

A. They had a cook house there which I had permission to use.

Q. By the way, was Bud Stevenson still living on the place there with his family?

A. Yes, living in the main living quarters, and I think at that time he boarded there through the cook house.

Q. Where did you live then during the harvest?

A. I was in the bunk house.

Q. Was your own family still up in Oregon?

A. Oh, yes. There was no place down there for them.

Q. What arrangements did you make for the crew?

A. I went up and got my mother to come down and take over the cooking operation for the harvest. She had had lots of experience with crews, and was the best I knew of anyplace in the country to have.

Q. During the harvesting on the Meiss Ranch were you there all the time or were you away part of the time?

A. I was there—I left once, when I went back up into Northern Oregon and got a beef—meat to eat. I went up one evening and come back the next morning. I was there all the time until they moved into the weed patch.

(Testimony of Clay Barr.)

Q. By that time the harvest was all over?

A. All the grain had been gotten, practically.

Q. Now when you left there after the harvesting was all done except the weed patch, where did you go and how long were you gone then? [202]

A. I went up to the ranch in Northern Oregon, and outside of a trip or two back I wasn't back there any more.

Q. About what date was it that you left the Meiss Ranch then to go back to Oregon? That is, when was the bulk of the harvesting completed, all but the weed patch?

A. Around the 5th, I would make a guess. That would be getting within two or three days of it.

Q. Of October? A. Of October.

Q. Then when did you move out completely from the ranch? A. On the 19th.

Q. The 19th of October?

A. October 19th.

Q. What arrangement was made for the sale of the crop, and who made it?

A. I contacted Mr. Herman to start the negotiations of it there, telling him what it took in order to handle the crop; that it might be awful nice to have the crop sold so you could load it on out on the boxcars, because there wasn't any elevators within a long distance, any public elevators. And he contacted Mr. Herman—or Mr. Tonkoff, I mean.

Q. Who made the arrangements for the sale of the crop?

(Testimony of Clay Barr.)

A. Mr. Tonkoff allowed Mr. Welch to sell the grain, I guess.

Q. Did you have anything to do with the sale of the crop at all yourself? [203]

A. No.

Q. There was a document produced here, a copy of a contract with—I think it is on a form of the Tulalake Grain Company, and apparently with Kerr-Gifford Company. A. Yes.

Q. Who entered into that contract?

A. Mr. Bud Stevenson signed for the landlord's share, and Mr. Welch signed for Mr. Tonkoff and Herman's interest.

Q. Did anybody present any contract to you for signature on the crop at all? A. No.

Q. Were you consulted at all about the sale of the crop once you had asked them to get started on it?

A. No. I started it, as I say, and I wasn't consulted about it. It actually wasn't any of my business, I guess. It was their crop.

Q. Did you ever receive a settlement sheet from Kerr-Gifford or anybody else up until here in court? A. No.

Q. Showing the accounting for the sale?

A. No, I have never saw one until I saw it laying on the table here yesterday.

Mr. Kester: There has been some talk here about the settlement of this lawsuit up in Spokane. For the record, your Honor, in going into this subject I do so with the reservation that I feel it is

(Testimony of Clay Barr.)

entirely irrelevant. But since it has been gone into we would like to inquire into it without waiving that position.

Q. What were the circumstances surrounding the settlement of that lawsuit?

A. Pertaining to what things, particularly?

Q. Without going into the merits or what the lawsuit was about, how did the suggestion come up as to a settlement?

A. That was my suggestion.

Q. Would you just explain what occurred there at that time.

A. I suggested it to Mr. Herman, who was my attorney at that time, and told him that I would give him my interest in this crop with the harvesting expenses back to take care of it.

Q. Now did you make any proposal in dollars as to what you would offer in the way of a settlement?

A. No. I was offering him the crop—period. That was the way I started it.

Q. Did you know at that time what the crop would yield?

A. Oh, no. You wouldn't have any idea.

Q. This was on what date, approximately?

A. June 10th. It had just been seeded, just finished seeding the day before, I think.

Q. The day before? [205]

A. Yes. It might have been two days.

Q. In other words, you came up to Spokane

(Testimony of Clay Barr.)

for that lawsuit right after the finishing of the seeding?

A. Yes. Well, they had a day or so after I left down there to finish.

Q. In other words, you left just before it was fully seeded?

A. Just before it was finished, yes.

Q. So at that time it wasn't even up in portions of the ranch?

A. Yes, there was a lot of it wasn't even up.

Q. Now at the time you offered to let them have your interest in the crop in settlement of that case did you make any estimate of what the crop would be worth? A. No.

Q. Somebody mentioned here that you had quoted a figure of a quarter of a million to \$300,000. Did you ever give any such estimate of the crop?

A. Why, that is impossible to quote. The largest crop that was ever raised on the place, Mr. Stevenson was saying there and putting a price on that year, only come to half of that.

Q. Did you make any such estimate or use those figures at all?

A. No, I wasn't using any figures. It was my intention just to say the crop, period, and no figures. That is the way I started it. [206]

Q. Did you ever have any direct conversation with Mr. Tonkoff or Mr. Welch or any of the adversaries?

A. No. Mr. Herman made the settlement.

(Testimony of Clay Barr.)

Q. After you told him that they could have your half-interest in the crop, then what was the next thing you knew about the settlement negotiations?

A. Mr. Herman went down to their hotel and made the arrangements, and through so many of them that was into it, it was my understanding they all started dividing dollars out of it, and they come back with the dollar figure that was given to me. Mr. Herman come back, and that was the first figures that was ever mentioned. Up to that point I started out with just the crop. Who made the different divisions, and so on, I wouldn't have the slightest idea.

Q. Do you know who arrived at this total of \$72,500 for all of these interests? Do you know where that figure came from?

A. I don't have the slightest idea who arrived at that.

Q. Did you have any direct conversation with Mr. Tonkoff at all about the settlement?

A. Not about the settlement. The only conversation I had with him was over at the courthouse after they had come back and—I don't know what you would call it, but they were suing the real estate man as well as myself, and I felt that he ought to stand a portion of this if there was going to be any settlement. And I talked to Mr. Tonkoff about his portion he should pay back to me, the real estate [207] man.

Q. Did you have any discussion with Tonkoff

(Testimony of Clay Barr.)

about the settlement between the two of you?

A. No, no. That was all settled at the time that Mr. Herman came back from his hotel. That was all settled there.

Q. Did you tell Mr. Tonkoff or anybody on the other side how many acres of grain had been seeded?

A. I was making an estimate on the acreage there was there.

Q. What did you estimate on that? How did you arrive at it?

A. My arrival at it, which was an estimate—and, as far as I know, the acreages on the ranch are still just estimates—was that I was informed there that there was approximately 3300 acres of total cultivated land out there and there was 200 acres out for potatoes. That would cut it to 3100. And then I estimated the ground that was plowed up. There was a strip along the north side, and there was a little piece over here on the east side, and at that time there was a piece over here on the dobe ground. That was purely my estimation of it, just looking at it and making a guess how much ground that was. I thought there was approximately 150 acres out there, so I called it 200. That would cut it down to 2900. Then I allowed 100 acres for good measure and quoted approximately 2800. That was the way I arrived at it.

Q. 2800 acres? A. Yes. [208]

Q. Do you know or does anybody know, in fact,

(Testimony of Clay Barr.)

how many measured acres there were in grain and the various crops?

A. Not to my knowledge, no.

Q. After the settlement of the Spokane lawsuit your father purchased the interest of Horton Herman. Did you know about that at the time?

A. Not until after it was purchased.

Q. Did your father consult with you about buying that at all?

A. Not until he had already purchased his interest of it.

Q. Now subsequently, on the 12th of October, I believe you made this assignment to Mr. Kirschmer. Would you explain the circumstances surrounding that.

A. I had purchased a piece of property in Colorado in which I owed a debt. It was an undivided half-interest in the property and also in the debt. We owed approximately \$100,000, the two of us, which was \$50,000 apiece, payable at so much a year. That came along about the first of March or the last few days of February every year. And I asked him if he would be interested in taking this \$15,000 payment that I was supposed to get in lieu of the annual payment on that debt, and he agreed that he would. So I assigned it to him.

Q. You made an assignment, and I believe a copy of it is attached to Kirschmer's deposition, which we will offer in due course. Since the making of that assignment to Kirschmer [209] what is the situation between you and him on that debt?

(Testimony of Clay Barr.)

A. Of course, the money was not paid to him, as I was expecting it to be, and he was expecting it, so when the payment date came along I had to make the minimum payment just the same, my share of it.

Q. Do you still owe money to Kirschmer on that? A. Yes.

Q. How much?

A. A little over \$38,000.

Q. That is on your \$50,000?

A. That is my interest of it.

Q. Is this assignment to Kirschmer still outstanding? A. Yes.

Q. Now you put in a claim here to that \$15,000 on behalf of Mr. Kirschmer, and if you collect that as a result of this lawsuit do you understand that that goes to Mr. Kirschmer?

A. It is still his money, yes.

Q. Now, referring to the ranch as a whole, was there any area of the ranch where there was any substantial amount of weeds except this weed patch that has been referred to in the southeast part?

A. No, there wasn't—the only weeds there was at all on the ranch outside of what we call the weed patch we sprayed, which was a very minimum amount.

Q. These weeds that were in the weed patch, was there any [210] time when in your judgment as a farmer you could have sprayed for those weeds without damage to the grain?

A. I was watching that very close, and as that

(Testimony of Clay Barr.)

crop came along in that weed patch there—as Mr. Liston testified there yesterday—the weeds started out and when they come up they come up right along with the grain, and they was ahead of the grain at all times clear through until the harvest. The grain was in such a sickened condition, the weeds being ahead, I don't think there was a time that that grain could have been sprayed successfully without killing out the grain and still get the weeds.

Q. Referring to the water situation, was there any part of the ranch aside from this dobe ground and the strip that you have mentioned along the west side of the potato field, besides those two places was there any place where any additional moisture would have made any difference in the grain crop?

A. No. Your dobe ground and that strip along the west side there was the only part in question at all. The rest of it was very plain to see—it was recommended to me, “You are better off to keep it away.”

Q. I believe you have already described the efforts you made to put water on the dobe ground and that strip along the west side.

A. Yes, there was efforts made and we were advised against [211] it: that it was doing more harm than good under those conditions.

Q. There has been reference here or an allegation that you plowed under 120 acres of oats. What

(Testimony of Clay Barr.)

was the reason for plowing under any grain that you plowed under?

A. Over in the weed patch the grain was so thin and the weeds was so bad there wasn't a chance of getting a kernel out of it before they got too big and clear out of control, and I had them go in there and plow that down to keep down the weed seeds for the next year.

Q. In your judgment was that a farmerlike thing to do?

A. Definitely. The only mistake I made, if it would have been my crop, is I didn't do enough of it.

Q. Were any of the combines or harvesting machines operated at such a fast speed that grain was wasted by reason of the speed of the operation?

A. Not in my opinion, no. I was out there all the time and I was with them constantly there, and in my opinion there wasn't.

Q. Were the trucks that were used to carry the grain in any way inadequate or improper for hauling grain?

A. No. As I say, the trucks that was on the place was good equipment, and the trucks we took down there was also good equipment. It was first-class machinery for hauling grain.

Q. Standard grain bodies?

A. Yes, standard grain equipment, used everywhere. [212]

Mr. Kester: I think that is all.

(Testimony of Clay Barr.)

Cross Examination

By Mr. Tonkoff:

Q. Mr. Barr, you testified, I believe, that you were on this ranch in 1948 and again in 1951.

A. Yes.

Q. Now you say a real estate man took you down to the ranch. Was that for the purpose of selling it to you or what?

A. No, not particularly to sell it to me. I did take a look at another piece of property, and he was trying to sell this ranch, and we did go over it, yes. I was interested in it, but not seriously.

Q. You were operating a great amount of acreage on other wheat ranches? A. One.

Q. In '53 and prior thereto?

A. All I was operating was the place here in Northern Oregon.

Q. How much did that amount to? How many acres?

A. There is 2300 acres in that place.

Q. You had been farming all your life. You are a good farmer, aren't you?

A. I consider myself one of the best.

Q. So you found out about this ranch and its reputation for [213] production, did you, as early as 1940?

A. Well, you go talking about reputation. I found out about the ranch. It had been for sale off and on there for several years. I don't know how serious they was considering it.

Q. You knew the capabilities as far as produc-

(Testimony of Clay Barr.)

tion was concerned? You were advised that in 1947 they took off an \$800,000 crop, weren't you?

A. I would question the amount of dollars you are speaking of there, but that was the biggest year the ranch ever took off. Mr. Stevenson told me so.

Q. He told you he got over \$800,000?

A. I don't think he quoted any dollars. He said it was the largest crop the ranch ever took off.

Q. At any rate, on May 5th you went down and you visited the ranch, and on the 7th you entered into this agreement which is Exhibit 14, did you not, the lease for the ranch?

A. The lease for the ranch was on the 7th. It was dated there, I think you will find.

Q. And among other things, the lease says that you as lessee agree to operate and farm said ranch diligently and to the fullest extent practicable and in a good and farmerlike manner; isn't that right?

A. I don't know the wording, but you are reading it there. If that is what it says——

Q. Then on the 11th of May you said you took over the ranch? [214]

A. Yes, I personally went down and I took over the expenses as of the date of that, and I had to kick back a little on the expense they was out until I was able to get down there.

Q. You were down there the 7th, weren't you?

A. I was down there the day that the lease was signed.

Q. Then on about the 5th of June you left the ranch, did you not?

(Testimony of Clay Barr.)

A. The 5th of June, yes, approximately the 5th of June.

Q. You went to Spokane to defend the fraud case that was brought against you; isn't that right?

A. I had a legal action in Spokane.

Q. A legal action. It was a fraud case, wasn't it?

A. Yes.

Q. After you listened to the testimony for two days you decided to settle; is that right?

A. It went on for one or two days there when we entered into a settlement agreement.

Q. You told Mr. Herman to propose a settlement; isn't that right? A. Yes.

Q. And at that time, Mr. Barr, did you not show us this lease that you had on this ranch in California?

A. I think I gave it to him. He probably showed it to you.

Q. For the purpose of showing it to myself and Mr. Welch and everybody concerned; isn't that right? [215] A. I imagine, yes.

Q. You say you made no representations whatever as to the amount of the crop?

A. Dollar figures, no.

Q. Did you not advise us that that was a good crop and was growing and was coming along very well? A. No, I didn't.

Q. You didn't say anything like that?

A. No. No, I never made any representations. I will tell you why I didn't.

Q. I don't care why you didn't.

(Testimony of Clay Barr.)

A. I am going to tell you why I didn't. Mr. Welch, it was my understanding, had been in that country personally and knew the ranch, probably knew it as well as anybody, knew it as well as I did, and he knew the place and you could take his representations of what he thought it was.

Q. You know very well, don't you, that Mr. Welch called the ranch before he gave you any answer?

A. Mr. Herman told me that—I don't know whether he told me that Mr. Welch called, but he told me that you had called down, I think.

Q. To find out the condition of the crop; is that right?

A. Well, I presume that is what you was calling for, to see whether it was all in that I had represented, and so on.

Q. Just a day or so before you got to Spokane, Mr. Barr, [216] some of your crop was up as high as eight inches; isn't that right?

A. Oh, Lord, no.

Q. It was not? A. Lord, no.

Q. Was any of the crop above the ground?

A. Yes. There was approximately half of it—after all, they had finished seeding there after I left down there. Part of that Bud had seeded was through the ground; probably the first half of what he had seeded was peeking through the ground. There was nothing up in the air.

Q. None of the crop was up above the ground?

A. Not to any height at all. You take grain,

(Testimony of Clay Barr.)

when it comes up it will shoot a spray maybe two to three inches straight up, and then it will sit there a couple of weeks and stool out. But it will never get that until two or three weeks afterwards. The stool makes a base for the grain.

Q. When you took over in May eleven or twelve hundred acres had been planted, hadn't they?

A. Yes.

Q. You still say there wasn't any crop above the ground?

A. I said there was crop above the ground, yes.

Q. To the extent of six or eight inches?

A. Oh, not any six or eight inches. There was nothing up like that. [217]

Q. Now did you make any representations as to the amount of the plantings down on the ranch to us in Spokane?

A. In acreage?

A. Yes.

A. I made my representations to Mr. Herman on the acreage.

Q. To convey to us?

A. To convey to you.

Q. Did you ever have any conversation with me at all during this settlement, Mr. Barr?

A. Just over in the courthouse in connection with the real estate man's interest, on what I might get from him for a rebate if I assigned this crop to you.

Q. Do you mean to testify I was representing the real estate man that was connected with you—

A. No, you came to me and asked me whether

(Testimony of Clay Barr.)

he was going to stand part of it, and I told you that he didn't want to.

Q. What concern was that of mine?

A. And you said, "Well, I will tell you what I will do." You says, "I will drop him out of this case and we will go ahead and sue against the real estate man alone, and whatever I get you can have it back. If I get any, you can have it." That was your words.

Q. What concern was it of mine whether or not the real estate man contributed?

A. Up to that point I wouldn't agree to give it unless he [218] would stand a share. You was wanting it, evidently.

Q. Did you make any representations as to the quality of the crops that were growing down there? You say you made a representation as to the quantity.

A. Just the acreage.

Q. Did we talk about what they might bring?

A. Not in front of me. I never talked on it to you.

Q. Did you tell Mr. Herman what they might bring?

A. No. The dollar end of this figure was you guys entirely. I was giving the crop. I wasn't caring what was decided on that it was worth.

Q. Now, you read this declaration, did you not?

A. Yes.

Q. Let me recall this provision, which says you and your wife "herein agree upon the harvest of said assigned crop to deposit the same at their ex-

(Testimony of Clay Barr.)

pense in a warehouse or warehouses and to have warehouse receipts therefor issued in the names of the assignees." That is Herman and myself.

A. Yes.

Q. "It is agreed that at the earliest practical date, not in any event to be later than November 15, 1953, said crop to be sold up to the extent of \$72,500 net to the assignees; and the assignees"—that is Herman and myself—"shall upon the receipt of said sum endorse and deliver over to the assignors all warehouse receipts, if any, representing any [219] of said crops not so sold."

Did you not tell us that these crops would bring over the sum of \$72,500? A. No.

Q. And that after we were paid you expected to get some back?

A. No. I knew it wouldn't make that. That is the reason I wasn't interested in what was over it.

Q. You knew at that time that we wouldn't get our \$72,500 which you agreed to settle for?

A. You can't say that you know anything when you are talking about a crop that is coming through the ground.

Q. Just a moment. I thought you said a month ago you knew it wouldn't bring \$72,500?

A. It was my estimation. That was a wrong statement.

Q. A wrong statement?

A. It was my estimation at that time that it wouldn't—

Q. That it wouldn't be—

(Testimony of Clay Barr.)

A. That it wouldn't get much over that.

Q. And yet you were willing to settle this case for the sum of \$72,500?

A. No. I was willing to settle the case for my interest in the crop.

Q. Why did you expect to get back the overage?

A. I didn't say I was expecting to get back any overage.

Q. You insisted on that provision, didn't you?

A. No.

Q. Didn't you have your tax man in Mr. Herman's office to consider your Internal Revenue tax in view of drawing this agreement?

A. Yes. That was just merely my standing tax-wise on the amount of money that you did get.

Q. And at the time you and I were there didn't he advise you that this would be a deductible item if you arranged the provisions and covenants of this agreement so that you could deduct that \$72,500?

A. He didn't say that I could deduct any \$72,500. He said I could deduct whatever you got from the net; that it was an expense from the money representing my income; that it would represent my expense, whatever it might be.

Q. Didn't he further tell you in my presence and in the presence of Herman that all sums you received above the \$72,500 would be income to you?

A. If I got it.

Q. And that your income would start after you paid us our \$72,500?

A. Yes, if I got it.

(Testimony of Clay Barr.)

Q. Didn't you also represent to me in front of Ed Welch that all this ranch had to do was bring less than \$100 an acre and it would be over a quarter of a million dollars, Mr. Barr? [221]

A. I never made any representation to you.

Q. You never made any representation to me?

A. That was all settled ahead of time. Before that ever come up you agreed to take it, and it ended at that point. The only thing that was held out on that settlement at all, you agreed to take the crop on this basis, and it was your figures that come back to me quoting dollars. The only provision I asked, I tried to get some rebate from the real estate man and find out from my tax man whether this would be a free cost to me.

Q. You were concerned about your income tax because you were going to make around a quarter of a million dollars that year, weren't you?

A. No. I was interested in the amount that you got and whether I would have to pay straight income on that and then wouldn't be able to deduct it off as a deduction.

Q. Mr. Barr, here in another place you and your wife agree as assignors "to farm said lands in a good and farmerlike fashion and in accordance with the terms of the aforementioned lease"—which has reference to the lease that you had with Hofues——

A. Yes.

Q. ——"it being understood and agreed that the assignors are not guaranteeing any particular yield, and shall not be liable for crop failure due

(Testimony of Clay Barr.)

to any cause beyond the control [222] of the assignors."

Now that same provision was also put into the declaration, wasn't it, as well as the assignment?

A. I don't recall. If you read it out of there, I presume it is in there.

Q. Here is another provision: "It is understood and agreed that in the event the net proceeds of the sale of said crop referred to in the assignment that are received by the assignees does not equal \$72,500, then such lesser amount as is received by said assignees, who are the trustees in this Declaration of Trust, shall be divided and paid to the above-named parties on a prorata basis in proportion that the amount each would receive if the net proceeds of sale equal \$72,500 bears to the amount of the actual net proceeds received."

Didn't you expect, Mr. Barr, that if this crop had brought a sum above \$72,500 to get the overage?

A. No. That was my request for that provision in there for my protection, when you come back and put a dollar figure to it instead of just taking the crop. I wanted a provision in there that you would take—as to what was to happen when it come under that.

Q. The question is, Mr. Barr, did you not expect to get the overage, or any sum in excess of \$72,500?

A. I would have got it, yes, under that agreement if there [223] would have been an overage.

Q. In any event, your position is now if you

(Testimony of Clay Barr.)

gave us the crop and if it didn't bring \$72,500 that would be our bad luck; is that right? If it brought over the sum of \$72,500 you wanted that?

A. I would have gotten it, yes.

Q. Now you went back to Spokane on June 5th, did you not?

A. At the time I went up there to prepare for this trial, yes.

Q. We settled this case on the 10th, the day we executed this assignment and Declaration of Trust; is that right? A. Yes.

Q. You and your wife signed it?

A. That is the date of it, I think.

Q. Did you come back after that to the ranch here? A. Within a couple of days.

Q. How long did you stay there?

A. I was there until the 20th.

Q. Then you went back to harvest your own crop up North?

A. To prepare for harvest at that time.

Q. You never then returned until I took you down to the ranch on July 2nd?

A. No, I was down there around the 1st with the spray man. You was down there the 3rd, I believe, wasn't it?

Q. Mr. Barr, you rode down with me and Mr. Welch, didn't [224] you? A. Yes.

Q. And we talked to you for two or three days before that on your ranch at Mikkalo, and picked you up at Arlington? A. Yes.

(Testimony of Clay Barr.)

Q. Isn't it a fact you had not been down there since you finished planting?

A. No, I was down there one trip between that.

Q. You talked to the spray man on July 2nd, according to the spray man's testimony. Was he wrong on the time?

A. He said approximately July 2nd, and I will go along with him. I don't know the exact dates.

Q. Then the next time you went down there was at harvest time; isn't that right?

A. Oh, Lord, no. After I went down there with you I brought Perry Morter down there between the 12th and the 15th.

Q. That is right. You went down July 15th.

A. Yes.

Q. Then after that you were down there for the harvest?

A. No, I was down there about once a week all summer, I was down there.

Q. If you were down there once a week, Mr. Barr, why was it necessary for you to go down with Welch and myself to ascertain whether or not the crops were not being irrigated?

A. I had been satisfied myself. I was wanting for you to [225] see the condition under which you had to irrigate and see that land, to show to you that you couldn't expect a big irrigation job.

Q. When you got down to Klamath Falls you met somebody from Texas who was negotiating to purchase your lease; isn't that right?

A. No. He was the landlord on the place I was

(Testimony of Clay Barr.)

farming. He was up there and he was going home, and I made arrangements to ride out with him before we ever went down. You had called and said you was going to be there a certain hour, and he was driving through, and he got in his car and drove down. When you came along we flew down and I met him. I had this arrangement before we left Arlington.

Q. Didn't you make a statement to me you were going to sell that lease for \$50,000 to him, and we were talking about how you were going to pay off this obligation?

A. No, I had no intention of paying off that obligation.

Q. He went to the ranch, didn't he?

A. Yes.

Q. Did you not show him the land?

A. We went all over the ranch the evening we got there. When you went out with Bud and Welch and went over the place, I went over the place with him.

Q. What obligation did you say you had no intention of paying off? [226]

A. I had no intention, I say, of paying that \$72,500 equity which you were claiming in that crop.

Q. I don't quite understand. You say you had no intention of paying this?

A. Of paying it out ahead of the harvest. You was to get the crop. I was still maintaining you

(Testimony of Clay Barr.)

were to get the crop. He didn't want to buy your interest in the crop.

Q. At any rate, you went over the ranch with this gentleman that took us down, and Welch and Bud and I went over the ranch together, didn't we?

A. Yes, you went over the ranch.

Q. The next morning I called your attention to the fact that the wheat was drying up and where it was dry it was small and was stunted, didn't we?

A. Yes.

Q. And you told me faithfully that you would come in the following Monday with a crew and start irrigating, didn't you?

A. I did not. I quoted yesterday the exact words that was said between you and I.

Q. When I complained to you about the irrigation you said, "Why don't you pay me off and take over and pay me my expenses?"

A. I says, "If you and Welch and the rest of them are not satisfied, why don't you give me the expenses I have been out and," I says, "you take it over and run it."

Q. What prompted you to say that? Was I making a complaint to you about anything? [227]

A. You was wanting me to irrigate.

Q. I was wanting you to irrigate?

A. Yes.

Q. Because it was dry; isn't that right?

A. Yes, there was dryness up there on that dobe ground.

Q. Your testimony is you didn't promise to come

(Testimony of Clay Barr.)

out the following Monday and start irrigating?

A. I told you that I would look into it and come down with another man and see how it would work out, but I wouldn't guarantee I was going to use any water.

Q. You never showed up for two weeks or three, did you?

A. I came down there between the 12th and the 15th.

Q. I thought you said that you came down there about the 15th, after we left there July 2nd?

A. How is that?

Q. I thought you said that you didn't return to the ranch until the 15th or 20th of July after you left there.

A. I said the 12th to the 15th; something like that.

Q. At any rate, you let it go by for two weeks without doing anything about it? Irrigation I am talking about.

A. If you want to keep it to the day, you could figure from the 3rd—no, the 4th. I went back on the 4th of July there and come back between the 12th and the 15th. I can't name that date.

Q. Isn't it a fact that some of those crops were then being [228] dwarfed in comparison to crops around the ditch banks where they had plenty of water?

A. There was a shortage up on that dobe ground.

Q. Now, Mr. Barr, you knew, did you not, that

(Testimony of Clay Barr.)

litigation was going to arise out of this situation down here as early as September 15th?

A. September 15th?

Q. Yes. A. How did I know it?

Q. Because you had a conversation with Mr. Stevenson, at which time you told him if he would keep out of the litigation between Welch and yourself that you would see to it he got a \$15,000 commission for the sale of the land.

A. That is your pipe dream there. Nobody had informed me—you hadn't contacted me in any way, shape or form, and I had no positive idea that there was going to be any litigation because we didn't know what the crop was going to be.

Q. Why did you sell your interest to Kirschmer on October 19th or 12th?

A. The main reason was my obligations was pretty great at that time, and you tied up my \$15,000 here, and there was a question whether I was going to have money enough to properly run the ranch.

Q. Mr. Barr, nobody had tied up this \$15,000 until the following January. It wasn't tied up when you assigned it, was it? [229]

A. Kerr-Gifford wouldn't pay it out at your request, or something. I don't know what that was all about.

Q. Mr. Kirschmer never asked you for an assignment then?

A. No. I asked him to take care of part of my obligations so it would relieve me of having to pay

(Testimony of Clay Barr.)

the money. It is all six of one and half a dozen of the other.

Q. Neither Mr. Kirschmer nor Mr. Hofues were satisfied with your operation of the ranch, were they? A. Yes, I think they were.

Q. You say they were?

A. As far as I know, with my operation of it, yes. I think they were.

Q. You heard them testify in Amarillo and in Las Vegas that they were not, didn't you, when we took their depositions?

A. They were testifying to the condition of the ranch, and they was also testifying there that the reason I was called in there was on account of poor operation. I couldn't help that part.

Q. Mr. Barr, you say you are one of the best farmers, and you mean to tell this Court that you can operate a ranch in the northern part of the state, four or five hundred miles away, by going there about four or five times during the summer?

A. That wasn't my intention when I took this lease.

Q. But that is what happened, isn't it? [230]

A. That was because I couldn't get complete possession to work in there and get down there at all the time.

Q. Is that why you neglected the property?

A. The property wasn't neglected.

Q. Now Stevenson was working for you, wasn't he?

A. No. I was subject to Stevenson's contract. I

(Testimony of Clay Barr.)

asked for him to be relieved of the ranch, but he had a contract and they couldn't relieve him.

Q. You signed this lease, didn't you?

A. Yes, I had signed the lease.

Q. There is nothing in this lease which says you are subject to Stevenson or anybody else, is there?

A. I believe if you will read it there it will quote that I am subject to leases, and names part of them, or something.

Q. You are subject, Mr. Barr, to James Noakes and Mary Noakes—that is the daughter of Mr. Stevenson—and that is the only one you are subject to. I mean that property is excluded from the ranch; isn't that right?

A. Yes. It is over here on the far side. Read the rest of the subjects, though.

Q. All right. "For and in consideration of the covenants and agreements of lessees as hereinafter stated and upon the terms and conditions herein-after stated, lessors do hereby lease and let unto lessees all of that certain property located in Siskiyou County, California, and known as the [231] Meiss Ranch, subject to leases of portions of said ranch heretofore made with James H. Noakes and Mary E. Noakes and with J. C. Stevenson and Juanita Stevenson and other leases covering approximately 240 acres of potato ground."

A. Yes.

Q. Otherwise you had full control. And the J. C.

(Testimony of Clay Barr.)

Stevenson referred to is the father, J. C. Stevenson, Sr., isn't that right? A. Yes.

Q. And Bud Stevenson, Jr., hadn't any lease on this property, did he?

A. No, but he had a working agreement on the property, a manager's agreement, or something like that.

Q. You agreed to farm it not only in this lease but also in the assignment that you gave?

A. Yes.

Q. Now, at the time you arrived there on the ranch the Noakes' crops were already harvested and forgotten about, weren't they?

A. They was still harvesting part of their crops after I pulled out and was gone on the 19th of October.

Q. After you pulled out on the 19th of October you say they were still harvesting after you left down there?

A. Yes. They still had some of it to harvest after I pulled out and had left.

Q. Now you are familiar with the fact it is necessary to [232] spray to preserve the wheat when weeds get in, aren't you?

A. Yes, under certain conditions.

Q. You mean to tell us that you used every precaution to prevent these weeds from getting in?

A. To my knowledge I did what I thought was the right maneuver there as far as weeds was concerned.

Q. You know, Mr. Barr, if you allow those

(Testimony of Clay Barr.)

weeds to get up past the grain before you start spraying——

A. They was always ahead of the grain on that field.

Q. You are supposed to spray them when they have two leaves on them, aren't you?

A. The weeds?

Q. Yes.

A. The smaller you can spray the weeds, the better, the easier it is to kill them.

Q. When you called in the spray man in July they were way above the grain; you couldn't see any grain, could you?

A. They was always above the grain there.

Q. At any rate, that wasn't the proper time to spray them, on July 2nd, was it?

A. If I was going to spray them at all, in my opinion that was the only time we stood a chance of spraying them without killing the grain.

Q. Well, the weeds killed the grain eventually, didn't they?

A. They took over—a part of it we was unable to harvest [233] entirely, yes.

Q. Now, Mr. Barr, there was only one bit of irrigation done that entire year and you stopped that; isn't that right?

A. How did you word that?

Q. I said there was only one bit of irrigation on that entire ranch during the year 1953, and when you found out it was being irrigated, the property was being irrigated, you stopped it?

(Testimony of Clay Barr.)

A. I stopped the irrigation. What irrigation was being done I stopped.

Q. You didn't do any irrigating at all?

A. Yes, we experimented with it.

Q. You know you can't grow crops down there without irrigation, don't you?

A. That is a questionable item. I wouldn't say no to that.

Q. You know you can't grow crops unless they are sprayed for weeds if they have weeds; isn't that right?

A. If the weeds is a serious condition it is a right thing to do to spray them if you can do it without harming the grain.

Q. Now you mentioned yesterday that on the west side where the dobe ground is there was some oats there that had fallen over from the year before.

A. East of the dobe ground, down in that bottomland down here. [234]

Q. I believe you said that they were what—two or three feet high?

A. I don't know. They was all tromped down there by the sheep. There had been sheep there and it was matted down, you know, all through the fall and early winter there.

Q. At any rate, those oats were a lot higher than the ones you grew in 1953, weren't they, in the same place?

A. I wouldn't say that they were.

(Testimony of Clay Barr.)

Q. Did you see the movies yesterday where they were up eight, ten to twelve inches high?

A. Where?

Q. In the pictures that we showed yesterday.

A. Yes, but in what part?

Q. The same part we are talking about, where you say——

A. Those oats down in that field where you are speaking of was good oats. The only shortage of oats, any short crops, was up here on this dobe ground there.

Q. Who drew the map, Exhibit 3, that is on the board there? A. Well, which one is 3?

Q. That one below, the colored one.

A. The colored one?

Q. Yes.

A. That was taken—it is my information there that the Government men took that.

Q. I said who drew it, who painted it? [235]

A. I don't know.

Q. You don't know who painted it?

A. I think they did, as far as I know.

Q. Is there any Class 1 land on there?

A. No.

Q. Now would you please take a look at this map that we got from——

A. This is a Government map here.

Q. What?

A. I say, that is a Government-made map there by the Soil Conservation down there. They painted it up and made it, to my knowledge.

(Testimony of Clay Barr.)

Q. Where did you get that map?

A. What?

Q. Where did you get that map?

A. Mr. Kirschmer gave it to me.

Q. Mr. Kirschmer gave it to you?

A. Yes.

Q. You didn't get that from the Government office down there?

A. No. I took it over to have it explained to me, and they admitted that it was their map.

Q. Take a look at Exhibit No. 1, our map that we got from the Government office down there, the land classification office, and tell the Court whether or not the Meiss ranch is not Class 1 land according to the legend on that map. First, [236] Mr. Barr, you show us where the lake is. It is marked "Meiss Lake," isn't it?

A. Yes, here it is marked "Meiss Lake." This map evidently was taken before the ranch was reclaimed. Isn't that right?

Q. Taken when?

A. Before the lake was reclaimed.

Q. It couldn't be, because the Government classified the land, about 90 per cent of it, as Class 1 land.

A. This line right across here, is that in the dike, the old dike that was originally put there?

Q. I don't know. It speaks for itself. It is marked "Lake," isn't it?

A. There is Meiss Lake, and there is the dike. The lake is shown over here.

(Testimony of Clay Barr.)

Q. Immediately west of that lake, isn't that all Class 1 land according to the legend on that map? You will find the legend at the southwest corner. Isn't that right, Mr. Barr?

Mr. Kester: It speaks for itself, whatever it shows.

A. Yes, this territory right in here is considered Class 1, right here.

Mr. Tonkoff: Q. You don't have any Class 1 land on your map, do you? A. No.

Q. You didn't get that map from anybody than Mr. Kirschmer?

A. He gave it to me and I took it over and had it identified [237] from the Government office as their map. They made it up. It is a soil classification from their office, is what he told me.

Q. As I understand it, after July the 15th, from the 12th to the 15th, you again returned to the Meiss ranch on August the 7th with three men, a combine and three extra trucks; is that right?

A. I think it was around the 7th or 8th or 9th.

Q. Was that September or August? I have it marked August. Maybe it was September.

A. No, August. As soon as the harvest was cleaned up here—I finished harvesting here the 7th, and we came down the next day. I think you will find that right, so it would be the 8th, I believe.

Q. You said the 7th. How long did you stay there that time?

A. Well, I was around there the biggest share of the time until the harvest started.

No. 15022

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Court of Appeals
for the Ninth Circuit

J. P. TONKOFF, individually and as trustee,
Appellant,

vs.

CLAY BARR and BETTY BARR, husband and
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Transcript of Record

In Two Volumes

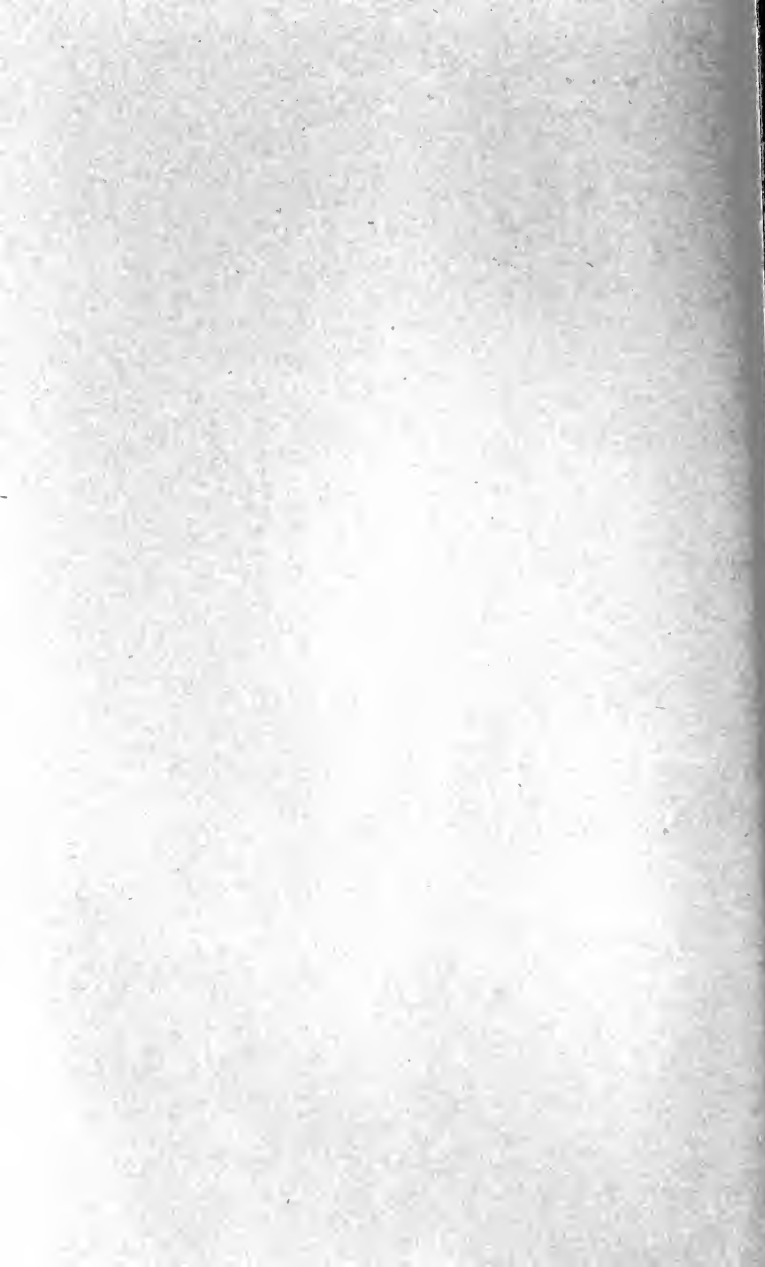
VOLUME TWO

(Pages 273 to 548, inclusive)

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FILED

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Appeal from the United States District Court for the
District of Oregon.

(Testimony of Clay Barr.)

Q. You were there from August 8th until you started harvesting on September the 8th, was it?

A. Yes, we started harvesting on there. I wasn't there all the time, but the biggest share of the time. I made a trip to Denver. That took me four or five days. I went to my landlord's over there.

Q. Where else did you go?

A. I was back up to Spokane. [238]

Q. How long were you gone in Spokane?

A. That was the time I gave notice to you of the approximate starting date of the harvest.

Q. What did you have to go to Spokane for? For Herman to write that letter for you?

A. No, I had a public accountant write the letter.

Q. How long did it take you to go to Spokane?

A. Oh, I was probably gone maybe three days. I am just guessing.

Q. Where else did you go?

A. I made one trip to Sacramento.

Q. How long did that take you?

A. I went down one day and came back the next.

Q. That is ten days out of thirty. Where else did you go?

A. I think I made one more trip back up to the ranch in Northern Oregon in that time.

Q. How long did you stay there?

A. Oh, I think I went up one evening and stayed there that day and then came back the next day.

Q. That is twelve days out of thirty. Where else did you go?

(Testimony of Clay Barr.)

A. I didn't go any other place.

Q. The rest of the time you spent on this ranch?

A. Yes, most of the time.

Q. What were you doing?

A. What? [239]

Q. What were you doing?

A. Well, we was just getting ready for harvest, preparing the combines, fixing up the bins and the motors, you know, and the trucks. We made one trip back up when we hauled in this self-propelled machine.

Q. Incidentally, Mr. Barr, there is about \$150,000 worth of equipment on this ranch, isn't there, or there was when you took over there?

A. The evaluation of used equipment, why, you will have to estimate the valuation. I wouldn't want to.

Q. You did have the kind of equipment to do with and to farm this property with, didn't you?

A. I quoted most of it out there on the place. And that was all that I was required to use under my lease, but in my opinion, to get it done in proper time on a late season, I needed more so I hauled in more.

Q. What did you sell your lease for to the Farnham boys?

A. I just quoted it to you there. By not getting this \$15,000 there was a question of whether I would have adequate expenses for the coming year to operate properly or not, so I sold it to them.

Q. I say, what did you sell it for, what price?

(Testimony of Clay Barr.)

A. Oh, for what price?

Q. Yes. A. I got \$21,000, I think it was.

Q. You had it up for \$50,000, didn't you, for awhile? A. What?

Q. You had it up for sale for \$50,000, didn't you, this lease?

A. I never had it up for sale for \$50,000.

Q. What has this \$15,000 got to do with it? Has it got anything to do with the sale to the Farnham boys?

A. No. That was just supposed to take care of the harvest which I didn't get back.

Q. Now the Farnham boys lived up there in your part of the country, up north, didn't they?

A. The one boy was in the service at that time, and the other boy was farming, oh, out of Steptoe, a little town in the Palouse country up there.

Q. Incidentally, do they owe you any money on the purchase of this lease? A. No.

Q. They paid it up?

A. Yes, they don't owe me anything.

Q. Did you operate any of the machinery on the ranch, Mr. Barr?

A. Meaning through the harvest, or anything?

Q. Yes.

A. No, my job—yes, I operated on odd jobs. I would go out there, you know, in the spring of the year when we was seeding there, you know—oh, one man got the toothache and [241] had to go to town to have his tooth pulled and I would fill in their jobs, take over, when one would be wanting to do

(Testimony of Clay Barr.)

something else a little bit, or just things like that. I never took a steady job at all. There was too much to do running around and looking after these machines to see that they was threshing properly.

Q. What relatives did you have down there?

A. What?

Q. What relatives did you have operating the machines?

A. Relatives?

Q. Yes.

A. My father-in-law was operating one machine, and I had two—I guess they would be second cousins, I guess.

Q. Those were the 18-year-olds?

A. There wasn't any 18-year-old boys there.

Q. How old were they?

A. You ask them when they get up here. I don't know just how old they are.

Q. They were under 20, anyway?

A. No. Let's see. I can tell you exactly what one boy is. He is 26 now, and that was two years ago, so he would be 24 at that time. But I don't know the other boy's age.

Q. Mr. Barr, you are experienced as a farmer, and you know that unless barley gets the proper amount of moisture it is not going to weigh up and it is not going to be brewing barley; [242] that is right, isn't it?

A. How did you have that worded, now?

Q. I said, as an experienced farmer—you say you are one of the best—you know that unless you have a sufficient amount of moisture to grow barley

(Testimony of Clay Barr.)

it will not go as brewing barley because it won't fill out and won't have the weight?

A. That is right, yes. But I think most of this made weight, didn't it?

Q. What?

A. I say, it is my understanding that most of that barley made weight, did it not?

Q. Not according to this computation sheet, it didn't. And that is one of the reasons why it didn't make brewing barley, is for the reason that it didn't have enough moisture to fill out?

A. That is your guess.

Q. I am asking you. I am not guessing. You are the expert farmer.

A. Well, there could be several reasons.

Q. What other reasons?

A. There is always a gamble when you are raising grain. It is one of the biggest gambles there is. You can get too much moisture in it, you can shrivel your growth of your stalk, making a thin, measly stalk, and it won't produce. You can get frost; you can dry out—there is several conditions [243] that can affect a crop. You are partially right on part of it, but that is not the only reason.

Q. The grain that you say was planted in the area where the ground was cracked didn't get enough moisture, did it?

A. No.

Q. That is because you didn't put the water on?

A. Oh, the cracks in the ground wasn't due from lack of moisture.

Q. They weren't?

(Testimony of Clay Barr.)

A. It was due from improper cultivation. If you had plowed that ground six or eight inches deep and cultivated it properly, made a seed bed and put a mulch there, it wouldn't have cracked there. You would have conserved the natural moisture that was on the place, and also killed out the wild oats. There was more wild oats than tame.

Q. It is your testimony, Mr. Barr, that you didn't know when your father bought out Mr. Herman for \$7,500?

A. No, I didn't when he bought it, until after he bought it.

Q. Your father knew about this whole business, didn't he?

A. Speaking of what, now?

Q. Well, about the assignment. He was at Spokane when you were being sued up there on that fraud case, wasn't he?

A. He came in there and sat on the trial one day.

Q. He knew about what you had done, assigned the crop, and so on? [244]

A. No, he didn't know I had assigned it.

Q. He didn't know that?

A. No, I didn't tell him that. After it was all over with he did.

Q. He knew it before he bought out Herman?

A. Well, after I had assigned it to you I told him, but before I didn't ask his advice or tell him or anything else.

Q. You expected to get more money out of this

(Testimony of Clay Barr.)

crop down here, didn't you, Mr. Barr, after we were paid off? A. That \$15,000.

Q. Other than that didn't you expect to get anything?

A. I wasn't expecting to get anything.

Q. That is one of the reasons why you didn't go down there and farm it, isn't it?

A. Absolutely not.

Q. Because you knew——

A. That ranch was farmed.

Q. Because this assignment provided you were to get your \$15,000 first to pay for harvesting; isn't that right? A. Yes.

Q. You say it cost you \$16,000 to harvest this small crop on there? A. Approximately.

Q. With your relatives running the machines?

A. Approximately. Running like that my expenses from [245] June 10th until October the 19th, until I moved away there, was just a few dollars over \$16,000, from June 10th, the time you took the assignment.

Q. How could you spend that much money down there?

A. I can show you my tax returns on that thing there of the year's expenses.

Q. Incidentally, you were not paying Stevenson, were you? A. Yes.

Q. How much were you paying him?

A. I paid him \$500 a month. Mr. Kester there, I think, has got the check in his hand there now made to Mr. Stevenson.

(Testimony of Clay Barr.)

Q. Your testimony is you were paying Bud Stevenson \$500 a month?

A. From the time I took over until he was relieved of his job.

Q. And that Hofues was not paying him?

A. He was paying me—he was taking care of everything up to that date. Mr. Hofues and Mr. Kirschmer was paying everything up to that date. I was to stand the monthly payments to him and they was to take care of the percentage end.

Q. What is the total amount of money you paid Stevenson?

A. Ask Mr. Kester there. It is twenty-four hundred and some odd dollars.

Mr. Kester: Do you want to see the check?

Mr. Tonkoff: We have a photostatic copy of it.

Mr. Kester: Do you want to offer it?

Mr. Tonkoff: Yes, let's offer it in evidence. This check is dated September 30, 1953.

The Court: Admitted.

(The check referred to, dated September 30, 1953, in the amount of \$2,438.37, was marked and received in evidence as Plaintiff's Exhibit 15.)

Mr. Tonkoff: Q. Is this the total amount that you have paid?

A. Yes, that is the total amount I paid Mr. Stevenson.

Q. When did you start paying that \$500 a month? A. How is that?

Q. You started paying in May, didn't you?

(Testimony of Clay Barr.)

A. That would be a short month, in May. We had to divide the month of May there. We estimated it there, the division. We didn't figure it to the day. We were just taking a rough figure on it.

The Court: Recess for ten minutes.

(Short recess.)

Mr. Tonkoff: Q. Mr. Barr, isn't it a fact that you sold your lease to Farnham brothers for \$35,000?

A. \$35,000? You asked me what I received from the sale.

Q. Oh, that is not what I asked you at all. I asked you what you sold it for. [247]

A. To break that down, it was sold through a real estate man. He sold it for \$35,000. He got \$5,000, and I agreed to leave seed on the place for their next year's seeding, and later he come back and knocked off \$9,000 for the seed that was on there, and I received \$21,000.

Q. Mr. Barr, wasn't it provided by your sale that you were to receive \$35,000, payable \$1,000 upon the execution of your agreement, which was dated the 25th day of August, 1953, and the sum of \$19,000 on or before the 15th of September, 1953, and the balance of \$15,000 evidenced by three promissory notes, totaling \$35,000?

A. I think that is the way the agreement reads.

Q. Will you examine this and tell me whether or not this is the agreement that you had with Farnham brothers? That is the agreement, isn't it?

A. That is the agreement.

(Testimony of Clay Barr.)

Mr. Tonkoff: I offer that in evidence, your Honor.

The Court: Admitted.

(The agreement referred to, dated August 25, 1953, was received in evidence and marked Plaintiff's Exhibit 16.)

Mr. Tonkoff: Q. Now Mr. Kirschmer also asked you to irrigate, didn't he? He called you on the phone and told you to start irrigating?

A. Kirschmer never personally asked me to irrigate. [248]

Q. Did he ever ask any of your men?

A. The only time that was brought up was at the time that I took over the lease, and the irrigation was concerned there, and there was a question of whether they would have water enough at that time. They was afraid they wouldn't, so they was drilling a new well, and that turned out to be dry. And he told me to not use the well water or the canal water or to interfere with the potato and the pasture men, because that might get them into trouble; if I wanted to do some irrigating to use the lake water.

Q. There was plenty of water for irrigation that season because you said it was spilling over the dike, didn't you? A. Lake water.

Q. Yes. You heard Kirschmer testify, didn't you, down in Amarillo? You were there when your counsel took his deposition?

A. Yes, I was there.

(Testimony of Clay Barr.)

Q. Do you remember when he was asked this question:

“Question: And at that time did he tell you that Mr. Barr had promised to come down in a day or two and start the irrigation?”

This is my cross examination. And he answered:

“Answer: No, he didn’t. He said that—he called me and told me that it should be irrigated. I said, ‘Well, I will call Clay,’ and I did.”

A. I called him on the irrigation after you was down there. [249]

Q. After I was down where?

A. After you was down there on July the 2nd or 3rd or 4th, along there, and told him that you was insisting on a little irrigation there. I told him that I was going to experiment on doing a little and see how it worked out.

Q. You didn’t do it for two or three weeks, though, did you?

A. There was irrigation done there. I was back down there between the 12th and the 15th with an extra man, and there was irrigation had been done before I got there.

Q. Anyway, did Mr. Kirschmer call you or didn’t he concerning the irrigation?

A. No, I called him.

Q. Do you remember him saying in his deposition at Amarillo that he did?

A. That he called me?

Q. Yes.

A. Well, he may have stated that.

(Testimony of Clay Barr.)

Q. Now, were the weeds always ahead of the grain down there, Mr. Barr?

A. Yes, the weeds was always a prominent factor over the grain for the simple reason under the poor conditions that arose there, the wet weather holds your grain back and makes a spindly, thin crop, turns it yellow-looking. It don't kill it completely out, but if it gets bad enough there it will. Lots of it did there. And the weeds will come along, and it is always a hardier crop than your grain. [250]

Q. Then there was no necessity for spraying?

A. There was some decent grain. That is what I was after, I was trying to see whether I could spray out what weeds there was to improve what grain there was.

Q. But by July it was too late to spray, wasn't it?

A. That is what the spray man said.

Q. Had you been down there prior to that time and called him it might have been a different situation, mightn't it?

A. I was just going on my own judgment. If the grain was so sick I was positive you couldn't spray until it had about three weeks of good sunshiny weather there to perk it up a little bit.

Q. Now Mr. Barr, do you remember when we were negotiating this settlement in Spokane you at one time offered to pay Mr. Charpentier and Judge Cramer a total of \$15,000.

A. Offered to pay who?

(Testimony of Clay Barr.)

Q. Mr. Charpentier and Judge Cramer, and we rejected that, didn't we?

A. I have no recollection of it.

Q. At any rate, we did agree on \$20,000 instead of ten or fifteen, didn't we?

A. I have no recollection of any dollar figures ever being mentioned in any settlement up there to me. It wasn't mentioned. [251]

Q. Mr. Barr, do you have any recollection of where your own lawyer told you that he wanted to get in on this too and put in \$10,000 for his services rendered to you?

A. When you had made your agreement of the dollar figures, how you was going to divide it, whether he did it or you did or your clients did it, that was the first dollar figures that came to me. After you had agreed to take it there was dollar figures.

Q. Do you recollect the time we spent half a day negotiating over offers and counteroffers down in the Davenport Hotel?

A. I was never in the Davenport Hotel at the time that was going on. That was you and Mr. Herman.

Q. You talked to your lawyer on several occasions before this was finally arrived at and the agreement consummated?

A. The only time I talked to him was—it was my offer to assign my interest in that crop, subject to the harvesting expenses, and he wanted to know what they was, and I just took a guess at

(Testimony of Clay Barr.)

them and said \$15,000. And I didn't miss it far. And he went to you, and when he come back it was all settled except the fact I wanted a rebate from the real estate man.

Q. You knew, didn't you, that nobody knew about your ownership of this leasehold interest down there at that time? We didn't know about it until you told us? You knew that, didn't you? [252]

A. I don't know whether you knew it or not.

Q. You just had gone into it on May 11th, and you remained down on the ranch until you went up to Spokane. You knew that nobody knew about your leasing this ranch, didn't you?

A. That is hard to say.

Q. You say you made no representations as to what this crop would bring?

A. In dollar figures, no.

Q. Did you make any as to the quantity of grain that it would produce?

A. No, I was quoting what I thought of the acres. My representation was approximately 2800 acres of ground, and which I knew that your man knew the ranch probably as well as I did. And I told Mr. Herman that I would give my half interest of that for a complete settlement of the case, just like I quoted.

Q. Did you make any representations as to the amount planted? A. The acreage?

Q. Yes.

A. Yes, to him. Not to you. I never talked this to you.

(Testimony of Clay Barr.)

Q. You signed this document, didn't you?

A. Sure. You wasn't present.

Q. You were present and so was your wife?

A. You wasn't present.

Q. I wasn't present? [253]

A. Not when I signed that document.

Q. You and your wife came to Ennis & Herman's office, did you not, in the Paulsen Building, didn't you?

A. And all your signatures was on it.

Mr. Tonkoff: I think that is all.

Redirect Examination

By Mr. Kester:

Q. Clay, Mr. Tonkoff has referred to this lawsuit in Spokane as being a fraud case against you. Will you just explain what that case was and how it came about and what it was all about.

The Court: I don't want to hear any more about that case. It is of no importance to me.

Mr. Kester: That is my position, but I just didn't want to let it go.

The Court: We are going to have to run over-time. I have to get into another case.

Mr. Kester: Q. When you were down there with Mr. Tonkoff somewhere around the 2nd or 3rd of July, and went back to Mikkalo and returned on about the 12th or 15th of July, during that time had you left any word with Bud Stevenson as to what you would like done in the way of work with the water?

(Testimony of Clay Barr.)

A. Oh, yes. I called to him and asked him if he would take the dragline and clean out the ditch so the water could get to that pump, and he did, and he started the pump there. And my man then was working there during that time putting water out on part of the ground.

Q. That is while you were gone?

A. That is while I was gone, yes.

Q. Now this agreement with the Farnham brothers on the assignment of your lease to them, counsel put in evidence the assignment which I showed him. Would you explain the difference between the way the contract was drawn and the way the thing ultimately worked out.

A. The contract called for \$35,000 payment over so many payments of so much money there—I forget the figures there—of which the real estate man out of it took \$5,000. And it also called for me to leave seed grain on the place.

The Court: I don't see what that has to do with this case, either.

Mr. Kester: Perhaps it doesn't, your Honor, but counsel went into it.

The Court: I am going to start clamping down now and hold this thing in closer limits.

Mr. Kester: There is this point involved, your Honor. I think we can make it short.

Q. Why didn't you leave the seed grain on the place as you had agreed to with the Farnhams?

A. Because I had assigned it over to them, and it would have been up to me to buy it out from

(Testimony of Clay Barr.)

Mr. Tonkoff and Mr. Herman, and I figured it was easier to settle the price of the grain with the Farnham boys than it was with them.

Q. By "them" you mean Tonkoff?

A. Mr. Tonkoff and Mr. Herman.

Mr. Kester: Now, will counsel stipulate that he wrote a letter on October 26th to Kerr-Gifford Co., of which I have shown him a copy here?

Mr. Tonkoff: Yes, if that is my letter I will do so.

Mr. Kester: Will you mark it and we will offer it in evidence.

The Court: Admitted.

(Copy of letter dated October 26, 1953, J. P. Tonkoff to Kerr-Gifford Co., was received in evidence and marked Defendants' Exhibit 17.)

Mr. Kester: Will you also mark this?

Mr. Tonkoff: The second one is the assignment, is it?

Mr. Kester: Yes, the notice of assignment.

The Court: Admitted.

(Copy of letter dated October 12, 1953, Clay Barr to Kerr-Gifford & Co., was received in evidence and marked Defendants' Exhibit 18.)

Mr. Kester: Exhibit 17, your Honor, is the demand by Mr. Tonkoff to Kerr-Gifford that they pay the trustee the entire 50 per cent, including the \$15,000 reserved.

Would you show Exhibit No. 18 to Mr. Barr, please?

(Testimony of Clay Barr.)

Mr. Tonkoff: I will stipulate with you that is the notice of assignment, to save some time.

Mr. Kester: Q. That notice of assignment which you have there was given to Kerr-Gifford on the date it bears there, October the 12th, was it?

A. Yes. It was made and signed that day and dropped in the mail. They received it a day or two afterwards.

Mr. Kester: That is all we have, your Honor.

Recross Examination

By Mr. Tonkoff:

Q. One more question. Did you sell all the grain off this property, Mr. Barr?

A. Off what property?

Q. The Meiss ranch.

A. No, you sold it, or you had Mr. Welch sell it.

Q. You mentioned a while ago that you gave the Farnham boys some wheat off of that property.

A. No, I didn't. I said that my agreement called for me to leave seed grain there, but in order to leave it there I would have had to have went and bought it back from you, and I figured it was easier to settle the price of the grain with them than it was with you. [257]

Mr. Tonkoff: That is all.

Redirect Examination

By Mr. Kester:

Q. One more thing, Clay. Did Hofues and

(Testimony of Clay Barr.)

Kirschmer ever complain to you about the way the ranch was farmed during 1953? A. No.

Mr. Kester: That is all.

Recross Examination

By Mr. Tonkoff:

Q. As a matter of fact, Hofues and Kirschmer were never on the ranch but once during the whole year, were they?

A. I won't say how many times they was out there. Kirschmer was out there twice, as I know of.

Q. That was before the crop was growing and coming out of the ground?

A. Kirschmer was out there three times, come to think of it.

Mr. Tonkoff: That is all, your Honor.

Mr. Kester: That is all.

(Witness excused) [258]

RALPH SMITH

was produced as a witness in behalf of the defendants and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Kester:

Q. Where do you live, Mr. Smith?

A. Granger, Washington.

Q. What is your occupation?

A. I am foreman of a sheep feeding yard.

(Testimony of Ralph Smith.)

Q. What has been the nature of your work most of your life? A. Farming.

Q. Did you work on the Meiss ranch during the summer of 1953? A. I did.

Q. Where had you been working immediately prior to that time?

A. For Mr. Barr at Mikkalo, Oregon.

Q. When did you come down to the Meiss ranch?

A. About the 8th of August.

Q. Did you come down for the harvest?

A. I did.

Q. Had you helped complete the harvest at Mikkalo before going down there?

A. That is right.

Q. What did you find when you got to the Meiss ranch at that time with respect to the condition of the grain as to whether it was ready for harvest or not? [259]

A. At that time the grain was not ready for harvest.

Q. What did you do then while you were waiting?

A. During the interval between the time I got there and the time we started harvesting I helped overhaul the machinery and trucks.

Q. About when did the harvest start there?

A. Well, that I don't remember for sure, but I would say around the 10th of September.

Q. Did you help bring down some of the extra equipment from the Oregon ranch?

(Testimony of Ralph Smith.)

A. I did.

Q. What did you do?

A. I drove the truck that hauled the combine from the Oregon ranch.

Q. Was that a combine that had been used on Clay's Oregon harvest just immediately before that?

A. That is right.

Q. Now did you work then in the harvest on the Meiss ranch?

A. Did I what?

Q. Did you work in the harvest?

A. That is right.

Q. What was your job?

A. My primary job was weighmaster and truck driver.

Q. Weighmaster at the scales in Macdoel?

A. Right. [260]

Q. How much truck driving did you do?

A. Well, I just did substitute truck driving whenever there was a loaded truck that needed to go to town.

Q. When you went into town in the morning to take over the scales did you take a truckload along with you?

A. At times I did, yes.

Q. Did you travel the road between the ranch and the railroad track every day?

A. Every day that we hauled grain down I did travel the road.

Q. Did you observe any unusual amount of grain spilled along the roadway?

A. Only on one instance.

Q. What was that?

(Testimony of Ralph Smith.)

A. That was the case of the tailgate coming open.

Q. Who had that experience?

A. I did.

Q. What happened?

A. Well, as I remember—I don't remember how the tailgate of the tractor was built at this time, but the tailgate jiggled open on the rough road, and about a fourth of a load of grain spilled.

Q. Could you estimate about how much that was?

A. I would say not over two ton.

Q. What kind of grain, do you remember?

A. It was barley. [261]

Q. About when was this in the harvest time?

A. Well, I believe that is was about the middle of the harvest.

Q. Did that grain that was spilled out lay along the road there for awhile? A. That is right.

Q. Up to that time had there been any grain lying along the road there?

A. Not so you could see.

Q. Were you able to salvage any of that grain?

A. No, sir.

Q. Over what distance was it scattered?

A. I would say around two and a half to three miles.

Q. Were you aware of losing grain as you were driving into town? Did you realize it was spilling out? A. No, sir.

Q. Did you have occasion to be out in the harvest field yourself?

(Testimony of Ralph Smith.)

A. Only on occasions of going out after a truck, or one of the boys wanting some help, or something of that sort.

Q. Your job as weighmaster there was to check the grain out at the railroad?

A. That is correct.

Q. Did Kerr-Gifford & Co. have a man there also?

A. There was a Kerr-Gifford man there sometime during every day, I believe. [262]

Q. What did he do?

A. He sampled the cars and billed the cars.

Q. How long did you stay there then?

A. I left the Meiss ranch on October 16th.

Q. Where did you go?

A. I went back to the Harvey Barr residence at Lacrosse, Washington.

Q. Did you work then for Harvey Barr?

A. No, I didn't.

Mr. Kester: I think that is all.

Cross Examination

By Mr. Fertig:

Q. What is your present occupation?

A. I am foreman of a sheep operation at Granger, Washington.

Q. You say you have been a farmer how long?

A. All my life.

Q. How long is that?

A. Well, I was born and raised on a ranch, and I am 29 years old.

(Testimony of Ralph Smith.)

Q. Where is the ranch you were born and raised on?
A. Cheney, Washington.

Q. Are farming conditions up there the same as they would be down in the Klamath Falls area?

A. I would say they were not.

Q. Now before August 8th had you ever been on that ranch?
A. No, sir.

Q. You don't know anything about how the crops were growing or anything else, do you?

A. No, sir.

Q. When you did get down there your job was principally that of weighmaster in town?

A. That is right.

Q. So you don't know anything about how the crops were harvested or anything else, do you?

A. I wouldn't say that I didn't know how they were harvested.

Q. Were you there and observed them harvesting them?

A. The first part of the harvest I drove truck from the field, and then I was there and watched the machines. I helped regulate the machines.

Q. You worked on the machines?

A. I only helped. Maybe I would advise the other fellows.

Q. You were there from August 8th to October 16th; is that right?
A. That is correct.

Q. What period of that time did Mr. Clay Barr spend there?

A. I would say that I saw Mr. Clay Barr nearly every day.

(Testimony of Ralph Smith.)

Q. He didn't leave?

A. I wouldn't say that he didn't leave. I don't know that he did. [264]

Q. You say you saw him nearly every day. Did he or did he not leave during periods of that time?

A. I don't know what Mr. Barr did at times that I didn't see him.

Q. Did he leave for a period of two or three days then?

A. That I don't remember.

Q. Did he leave for a period of two or three days on several occasions?

A. That I don't remember, either.

Q. But you remember seeing him every day?

A. I didn't say I remember seeing him every day. I said I saw him nearly every day.

Q. So he could have been gone periods of time too, couldn't he?

A. He could have been gone a day, right, or two days.

Q. You say that after you left there you went—you had been working for Clay Barr before; is that it?

A. That is right.

Q. And then you went to work for Harvey Barr?

A. No, I didn't say I went to work for Harvey Barr.

Q. Did you go to his home?

A. I went to his home.

Q. Are you related to him, or something?

A. No, sir. [265]

(Testimony of Ralph Smith.)

Q. Did you live with him? A. No, sir.

Q. You just went there to visit?

A. Went there to visit.

Q. I see. You have been friends with the Barrs a long time? A. I have.

Q. How long?

A. I would say for around seven years.

Q. Now, how long had you worked for Clay Barr before August 8th?

A. I believe about a month.

Q. Is that the only time you had ever worked for him? A. That is right.

Q. Now, as weighmaster your duties are confined down where the scales are?

A. I wouldn't necessarily say that, either, because we didn't always haul to town.

Q. Now, you said that you didn't observe an unusual amount of grain on the highway as you would drive in and back? A. That is right.

Q. Did you observe grain on the highway as you would drive in and back?

A. A very slight amount until the time that the tailgate on the truck——

Q. But was there always grain on that highway as you would drive in and back? [266]

A. No, sir.

Q. There would be times there was none?

A. That is right.

Q. At times there was some?

A. At times there were some.

Q. How long is that stretch of highway?

(Testimony of Ralph Smith.)

A. I believe it is about five miles from the ranch to the scales.

Q. There would be some all the way along that highway; is that it?

A. No, sir; not all the way.

Q. Would it be in spots?

A. As I remember it, there was a short section of road that was paved road, and along that paved road there was relatively little grain at any time.

Q. How long was that stretch?

A. Well, sir, that I don't remember.

Q. How often did you drive it?

A. I drove the road every day that we hauled grain to Macdoel.

Q. You don't remember how long the stretch was?

A. I would say it was about a mile or a mile and a half, but I wouldn't swear to it.

Q. There was no grain there?

A. Relatively little grain. [267]

Q. Then where did you start finding more grain?

A. Well, as I say, it was from the point where I noticed the endgate open until the ranch.

Q. How far was that?

A. I would say that was about two and a half or three miles.

Q. So there was some grain at all times for that two and half to three mile stretch?

A. After the harvest was started, well into the harvest, I would say there was a little grain, yes.

Mr. Tonkoff: That is all.

Mr. Kester: That is all.

(Witness excused) [268]

LEONARD FLINT

was produced as a witness in behalf of the defendants and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Kester:

Q. Where do you live, Mr. Flint?

A. I live at Beaverton, Oregon.

Q. What has been your occupation?

A. Farmer.

Q. Are you farming now?

A. Not at the present time.

Q. You are more or less retired right now?

A. Yes.

Q. How long have you been acquainted with the farming business? A. All my life.

Q. What type of farming have you done?

A. Grain farming.

Q. In what parts of the country?

A. In Adams County, Washington.

Q. In Eastern Washington? A. Yes.

Q. Were you familiar with the Meiss ranch in Northern California?

A. Well, not too familiar, no.

Q. Did you work there during the summer of 1953? [269]

A. I worked there during the harvest.

(Testimony of Leonard Flint.)

Q. During harvest time? A. Yes.

Q. Do you know the Barrs?

A. Yes, sir.

Q. Had you worked on the Barrs' Oregon ranch?

A. I worked on the ranch at Mikkalo.

Q. How long did you work there?

A. Well, about three years.

Q. Were you working there in the summer of 1953? A. Yes.

Q. Did you work through the harvest of 1953 on the Oregon ranch? A. Yes.

Q. After completing the harvest there did you go down to the Meiss ranch? A. I did.

Q. Did you help take some equipment down there? A. No.

Q. When did you get down to the Meiss ranch?

A. I got there the 10th of September.

Q. What was your job then in the harvest?

A. I operated a machine.

Q. By a machine you mean a combine?

A. Yes, sir. [270]

Q. Had you operated a combine before?

A. Yes.

Q. Over how long a period of time had you had experience in operating combines?

A. About 15 years.

Q. Had the harvest already started when you got to the Meiss ranch?

A. Well, they had cut a little piece of wheat a day or two before that.

(Testimony of Leonard Flint.)

Q. So that you were practically at the beginning of the harvest? A. Well, yes.

Q. From that time on did you operate a combine continuously during the harvest?

A. I did.

Q. What can you tell us with respect to the way the harvest was conducted?

A. Well, I think it was conducted in a business-like manner.

Q. Did you notice any unusual amount of grain being wasted in the fields? A. I did not.

Q. Will you describe for us how the harvesting operation was carried on later, and what happened to the grain.

The Court: That is cumulative, Mr. Kester.

Mr. Kester: Very well. [271]

Q. Did you notice grain spilled in the fields following the combines? A. No.

Q. What type of machine did you operate? The self-propelled?

A. I operated the self-propelled.

Q. Did you notice the condition of the fields after the harvest was completed?

A. In what way?

Q. Well, as to whether there was grain left in the fields. A. No, there was not.

Q. You know there was not. I am not sure that the answer was clear. Was there any grain left in the fields after the harvest?

A. No, there wasn't any except at the weed patch.

(Testimony of Leonard Flint.)

Q. At the weed patch. What was the condition there? A. Well, it was awful weedy.

Q. What did that do to the harvest?

A. Well, you couldn't separate the weeds from the wheat or the grain.

Q. Will a combine run in weeds like that?

A. Not too good.

Q. What happens when it does?

A. Well——

The Court: That is also cumulative.

Mr. Kester: Q. Did you operate a combine in the weed patch yourself? [272]

A. I did.

Q. Did you have the experience of it plugging up with weeds? A. Some.

Q. Do you recall whether, as the grain was harvested, it was all ripe enough for immediate shipment? A. No, it wasn't.

Q. What was done with that that was not?

A. It was put in bins there on the ranch to dry.

Q. And then rehandled for loading?

A. Then rehandled.

Q. Were you there until the end of the harvest?

A. I was.

Q. About when did you leave?

A. Oh, I couldn't say exactly. It was probably about the 14th.

Q. Of October? A. Yes.

Q. Did you notice any of the combines being operated at too fast a speed?

A. No, I didn't.

(Testimony of Leonard Flint.)

Mr. Kester: I think that is all.

Cross Examination

By Mr. Fertig:

Q. May I ask you, Mr. Flint—you had a ranch of your own, did you say, up in Adams County, Washington?

A. No, I didn't. I said I had worked on ranches in Adams County.

Q. In Washington? A. Yes.

Q. Did you study the terrain down here in the Klamath Falls area where this Meiss ranch is?

A. What do you mean, study the terrain?

Q. Look over the layout of the ground, the different kinds of land.

A. Oh, I saw the land, yes.

Q. You saw it. How does that compare with the land that you were used to farming up there in Washington?

A. It is a different type of land altogether.

Q. A different type of farming operation, isn't it?

A. Well, I don't know. It all adds up to the same thing.

Q. It does? A. Yes.

Q. You mean you don't farm different kinds of land differently?

A. No. You have to till the land, don't you?

Q. Don't you give different care to different types of soil? A. Oh, I suppose.

Q. Don't suppose, sir. You are an experienced

Testimony of Leonard Flint.)

farmer. Don't you give different types of care to different types of soil? A. Yes. [274]

Q. Don't you harvest it a little differently based on terrain? A. No, you don't.

Q. You run your combine the same way on hilly land as you would on flat land, you run it the same if you have cracks or openings as you do on land that you do not, and you run it the same on land where the wheat is very low or your crop is very low as you do where it is much higher? You run it all the same. Is that your idea?

A. You have to go over the land, don't you, just the same?

Q. You run it the same way?

A. Why, certainly.

Q. No difference. That is how you would run your combine. You wouldn't study the land or anything else. Is that your testimony, sir?

A. You study the height of your wheat or your grain, don't you, and you cut—

Q. I am asking you, sir. You will answer me, please. You are going to run it the same regardless of what part of the United States you are located in, whether you are on flat land, hilly land, dry land, or soggy land? It doesn't make any difference?

A. In heavy grain you run your machine—you don't run the same speed, no.

Q. You don't? A. No, you don't. [275]

Q. Have you ever had experience in land just like there was on that Meiss ranch? A. No.

(Testimony of Leonard Flint.)

Q. You had never been on that ranch before the 10th of September? A. That is right.

Q. Is that right? A. That is right.

Q. You don't know how it was farmed or anything else about it before the 10th of September, do you?

A. No, I wasn't there to see how it was farmed.

Q. How did you happen to be working for Harvey Barr or Clay Barr that year?

A. I was working for Clay Barr on the Oregon ranch.

Q. Had you worked for him previously?

A. Yes.

Q. How long?

A. About five years.

Q. Always in Oregon?

A. Oregon and in Washington.

Q. Oregon and Washington. You mean he had a ranch in Washington too?

A. Before he moved to Oregon, yes.

Q. You are not related to him? A. No.

Q. Your only relation has been that of employer and employee, and you worked for salary or wages?

A. Yes. His wife is my daughter.

Q. His wife is your daughter. Then your acquaintance with him has been since this marriage?

A. Yes.

Q. That has been some time?

A. A little time, yes.

Q. Would you say there were quite a lot of weeds on that ranch?

(Testimony of Leonard Flint.)

A. On this one particular spot, yes.

Q. Lots of them? A. Lots of them.

Q. Enough to destroy the crop?

A. Well, I would say yes.

Q. Were there any weeds up any place else?

A. No.

Q. What did the grain look like in the dobe land?
A. Well, it looked very poor.

Q. A pretty poor crop? A. Yes, sir.

Q. Were there cracks in that land?

A. Some.

Q. Was the land dry?

A. I would say it was. [277]

Q. Large cracks, small cracks, and different sized cracks; is that it?

A. Oh, I didn't pay any attention to that part of it.

Q. What?

A. I say, I didn't pay any attention to the cracks.

Q. You drove over them every day, didn't you?

A. Well, they were not so large but what you could——

Q. Didn't you look at them?

The Court: He didn't testify about anything like this on direct. Gentlemen, I am going to hold both sides down closer from now on. I am not going to let you ramble any more.

Mr. Fertig: That is all, your Honor.

Mr. Kester: Thank you.

(Witness excused) [278]

PERRY MORTER

was produced as a witness in behalf of the defendants and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Kester:

Q. Where do you live, Mr. Morter?

A. I live at Hooper, Washington.

Q. How old are you? A. Twenty-one.

Q. What has been your work?

A. I have been a farmer.

Q. How long?

A. My entire life.

Q. You were born and raised on a farm?

A. Yes, I was.

Q. Have you been working for Clay Barr?

A. I have worked for Clay Barr.

Q. Have you also worked for Harvey Barr?

A. Yes, I have.

Q. Did you work on the Meiss ranch during the summer of 1953? A. Yes, I did.

Q. When did you first see the Meiss ranch?

A. The first part of May of 1953.

Q. What was the occasion for your being there?

A. I went along with Harvey Barr, accompanied Clay Barr to [279] drive down to the ranch because of Mr. Barr's age. I just went along to accompany him driving because of his age.

Q. Did you go around with him and look at the place at that time? A. Yes, I did.

(Testimony of Perry Morter.)

Q. What was the condition as you saw the ranch at that time?

A. At that time most of the land around there was very wet.

Q. Was the seeding going on at that time?

A. Yes, it was.

Q. Did you come back then again at a later time?

A. Yes, sir.

Q. When was that?

A. I went along with my brother, Harold Morter, and Clay Barr down to the place approximately the 10th of May.

Q. Did you and your brother then work at the seeding?

A. Yes, we did.

Q. Do you recall how much had been seeded before you fellows started in?

A. Approximately the various fields that had been seeded, I do recall that.

Q. Which ones had already been seeded before you got there?

A. What has been referred to as the dove ground, which lies on the west side of the place, and the weed patch, which lies down on the south-east side of the place.

Q. Did you stay there and work during the seeding? [280]

A. Yes, I did.

Q. How long were you there for that part?

A. We finished seeding the first part of June, and we finally finished our work which we had to

(Testimony of Perry Morter.)

do around there at approximately the 20th of June.

Q. Then what did you do?

A. I came back up to Harvey Barr's ranch in Lacrosse, Washington.

Q. Then did you come back to the Meiss ranch again? A. Yes, I did.

Q. About what time?

A. Approximately the 12th or 15th of July.

Q. What was that occasion?

A. Clay Barr took me down there to take care of whatever work was necessary to be done and to keep him informed of any unusual conditions which might arise. That is, I was taken down there for the purpose of following Clay Barr's orders as to whatever he told me to do, and inform him of any unusual conditions that he would be interested in.

Q. Then did you stay there from about the 12th or 15th of July through to the end of the harvest?

A. Yes, I did.

Q. Were you there all that time?

A. Yes, sir.

Q. What was the condition of the fields and the crop up in this dobe ground as the summer went along? [281]

A. The dobe land was dry.

Q. Did you make any attempt to do any more about that? A. Yes, we did.

Q. What was that?

A. After we were down there Clay told me to

(Testimony of Perry Morter.)

try irrigating at various places, which I did try to do.

Q. What did you try to do in the way of irrigating?

A. There were some small ditches out through that dobe ground there, and we would cut those ditches open at various spots and irrigate from them.

Q. What happened to the water? How did it act?

A. The land was very unlevel up there. You couldn't turn that water on there fast enough to make it reach those high points but what it would go down in the lower bottomland.

Q. Did you have some orders about the water as far as the bottomland was concerned?

A. Yes, sir. I called Mr. Barr and told him what the conditions of irrigation were as I had found them when we were trying to irrigate, and he ordered me to shut the water off.

Q. Before that did you have some instructions about whether you should let water get down into the bottomland or not?

A. Yes, sir.

Q. What were those instructions?

A. He told me not to let any water get down in the bottomland. [282]

Q. Did you know the reason for that?

A. Just my personal opinion. I would have thought that water down in the bottomland was likely to start a second growth which would delay the harvest of that grain.

(Testimony of Perry Morter.)

Q. Now what was the condition of the ranch as far as weeds were concerned? Were there any weeds except in this one patch that has been referred to? A. None to speak of.

Q. In that weed patch was there any grain crop there along with the weeds? Did that amount to anything?

A. There was a grain crop there, but it was a very poor one.

Q. Do you know why the grain was poor there? Were you there during the time it was starting to grow?

A. That portion of the ground was already seeded when I got there, and I am unable to say what the cause of it was, but that grain looked yellow and sick from the time I saw it.

Q. Was it sick all summer long?

A. It appeared to me to be.

Q. Did you participate in the harvest?

A. Yes, I did.

Q. What was your job in the harvest?

A. I operated a John Deere rig, a combine.

Q. Had you operated a combine before?

A. Yes, sir.

Q. Over what period of time had you had experience with [283] combines?

A. I have been working and operating combines—I first started when I was 16 years old. That was back in 1950.

Q. This combine that you were operating on the Meiss ranch, was that a part of the regular equip-

(Testimony of Perry Morter.)

ment of the Meiss ranch or one that was brought in specially?

A. That was part of the regular equipment of the Meiss ranch.

Q. Was it being pulled behind a tractor?

A. Yes, sir. It was a pull machine.

Q. Did you notice any unusual amount of grain being spilled or wasted after the combines?

A. No, sir. There was no unusual amount of grain being wasted out of any of those combines that I observed.

Q. Did you notice any of the combines being operated at too fast a speed? A. No, sir, I didn't.

Q. Did you have occasion to go back and forth on the road to town?

A. Occasionally in the morning when maybe it would be too damp to harvest, or maybe a slight rain condition in the morning, and we might have a loaded truck to go to town. That was very few times, though.

Q. Did you notice grain that was spilled from the endgate that came loose from a truck?

A. Towards the end of the harvest I did notice a place where [284] there appeared to be such an accident.

Q. Up until that time had there been any unusual amount of grain along the roadway?

A. Not that I noticed, sir.

Q. What is the fact as to whether the harvest started as quickly as the grain was ripe enough to cut?

(Testimony of Perry Morter.)

A. We started just as soon as the grain was ready to cut. In fact, we were waiting around there just a couple of days before it was ready.

Mr. Kester: You may inquire.

Cross Examination

By Mr. Fertig:

Q. You say you went down there early in May of 1953?

A. The first part of May; yes, sir.

Q. And that was just to drive Mr. Barr's father down?

A. Yes, sir. That was the occasion for me going along with him, because otherwise I would have been on his ranch working.

Q. Whose ranch? A. Harvey Barr's.

Q. I see. Are you related to the Barrs?

A. Yes, sir; I am.

Q. What relation are you?

A. Harvey Barr and my grandfather are brothers.

Q. In addition to being a farmer during the last several [285] years you did go to school, didn't you?

A. Yes, sir; I did go to school. I graduated in 1952.

Q. What school was that?

A. That was the Lacrosse High School at Lacrosse, Washington.

Q. Then after you graduated did you take up farming as a full-time occupation?

A. Yes, sir; I did.

(Testimony of Perry Morter.)

Q. And you have done that continuously ever since? A. Yes, sir.

Q. You are now presently occupied in farming as an occupation? A. That is correct.

Q. Where now?

A. At Harvey Barr's ranch at Lacrosse, Washington.

Q. Then your experience as a farmer has always been with the Barrs; is that it?

A. No, sir. I had experience with Clay Barr in the year of '53 as a farmer.

Q. Now, as to the farming conditions up in Lacrosse, Washington, is that irrigated farming?

A. The majority of it is not irrigated farming. However, there is some irrigation.

Q. There is not very much around there, though, is there?

A. It is growing all the time.

Q. What?

A. There is portions of the Washington country up there that [286] is getting irrigated more all the time.

Q. Around Lacrosse, I am talking about.

A. Around Lacrosse there isn't too much irrigation, no.

Q. How about Harvey Barr's farm?

A. We don't do any irrigating there.

Q. Then where had you had any experience in handling irrigated farming?

A. I have never had any experience in handling irrigated farming before.

(Testimony of Perry Morter.)

Q. So in 1953, when you testified that you were sent down or taken down there by Clay Barr—I believe you testified like this: “Clay told me to try irrigating the dobe land.” Was that your testimony? Do you remember that, sir?

A. I believe that is correct.

Q. What experience had you ever had in trying to irrigate any kind of land before that?

A. I have never had any experience.

Q. You say there were ditches built through that dobe land?

A. Not sufficient to irrigate the land down there.

Q. You are going to be an expert on irrigation now?

A. No, sir; I don't pretend to be an expert.

Q. Then just answer my question.

Mr. Kester: Pardon me. Let's confine the cross examination to the direct.

Mr. Fertig: Q. I will ask you to answer my question, [287] please. I believe the question was were there ditches through that dobe land.

A. Very few.

Q. Were there ditches upon the dobe land? You can answer that Yes or No, sir. Were there irrigating ditches in the dobe land? You can answer that Yes or No.

A. Portions of it there was, and portions of it there wasn't.

Q. But there were ditches; is that correct, sir?

A. There were a few ditches, yes.

(Testimony of Perry Morter.)

Q. And those were irrigating ditches, weren't they?

A. They were put there for that purpose.

Q. Now was there a pump up near there?

A. About one-third up in the dobe land.

Q. How did that pump operate?

A. Why, that pump elevated this water from the main canal coming from the lake up into these smaller irrigation ditches up there.

Q. Did you know how to operate that pump?

A. Yes, sir; I did.

Q. Did you use it? A. Yes, sir.

Q. Then didn't it force the water into the dobe land?

A. Portions of it it did and portions of it it didn't.

Q. But portions of it were able to receive beneficial irrigation through the use of that pump; isn't that right? [288]

A. Very small portions of it.

Q. What do you mean by "small portions"? How much? How much acreage is there in this dobe land?

A. I never heard any acreage quoted, and I wouldn't be able to give you any acreage estimate.

Q. So you can't give any acreage estimate. You have never done any irrigation work before you were taken down there and put in charge; is that correct? A. That is correct.

Q. Now, when you were down there in May of 1953—you were talking about the weed patch. When you were down there in May of 1953 you say they

(Testimony of Perry Morter.)

were planting the weed patch? A. No, sir.

Q. Were they seeding it, or what were they doing with it?

A. It had already been planted at that time.

Q. What was the condition of the crop?

A. It looked very sickly.

Q. Were there any weeds there then?

A. I really didn't observe it at that time.

Q. Now you looked around there, didn't you? You saw the crop, and you saw the crop was sick. Now if there had been any weeds there wouldn't you have seen those too?

A. Small weeds, when they are first germinating, are very hard to see.

Mr. Fertig: Just a moment. If the Court please, that [289] can be answered——

The Court: You let him alone. Quit riding that young fellow.

Read the question.

(Last question read.)

The Court: Answer the question.

A. Yes, sir.

Mr. Fertig: Q. Were there any there?

A. A few.

Q. You saw a few. Were there enough to interfere with the crop at all?

A. I couldn't tell at that time.

Q. Then you came back on the 10th of May; is that correct? A. That is right, yes.

Q. Did you look at that area again?

A. As we were going out to our work we had

(Testimony of Perry Morter.)

to go by it every day, and I did observe the area.

Q. How did it look then?

A. There were a few weeds in it, and the crop looked very sick.

Q. Was anything being done about the weeds then?

A. I really wouldn't know about that, because I wasn't in charge of the operation.

Q. Then you went back the 10th of May and you stayed on until into June? [290]

A. That is correct, sir.

Q. During that time did you observe—you stayed until what part of June?

A. Approximately the 20th of June.

Q. Did you observe between the 10th of May and the 20th of June whether anything was done to the weeds that were starting to grow in what you call the weed patch?

A. No, sir; I didn't.

Q. They were just left to grow; is that it?

A. As I said before, I wasn't in charge of the place, and I wouldn't know if there was any attempt made or not.

Q. Who else was there? Who was in charge?

A. Clay Barr, sir.

Q. Was he there?

A. The majority of the time; yes, sir.

Q. And by the majority of the time you mean from the 10th of May to the 10th of June?

A. That has been back quite some time, but to the best of my knowledge I believe that he was.

(Testimony of Perry Morter.)

Q. What were your particular duties?

A. I worked with Clay Barr as maintenance and care of the machinery, mostly, and operating the machines whenever it called for it.

Q. Did that take you out into the fields, or did that keep you right by the house or by the sheds?

A. No, sir; that took me out into the fields on various occasions.

Q. When you went out to these fields didn't you observe whether anybody was working in them, whether they were spraying or whether they were doing anything about the weeds or not?

A. Yes, sir.

Q. Did you ever see anybody doing anything about them?

The Court: You admit, don't you, that there was never any effort at weed control?

Mr. Kester: Certainly, your Honor, not in this weed patch, except for plowing up some of it.

Mr. Fertig: All right.

Q. Did you ever observe up to the 10th of June when you were there any irrigating going around that particular ranch?

A. No, sir; I didn't.

Q. I see. So as far as you know there was no irrigating done up to and including the 10th of June when you left? Is that a fair statement?

A. That is correct.

Q. Then you left on the 10th of June and didn't come back until the 12th or 15th of July; is that correct?

A. Yes, sir.

(Testimony of Perry Morter.)

Q. So naturally you don't know anything that took place while you were away?

A. That is natural; yes, sir. [292]

Q. Then you came back the 12th or 15th of July. Clay Barr took you down there, I believe you testified, to do any work and to keep him informed as to unusual conditions that he might be interested in. Now what unusual conditions did he want you to tell him about?

A. Why, there was always unusual conditions, such as the potato men were using water there, and there was always a possibility of someone running a ditch over and getting that water down into parts of the grain land where you wouldn't want it.

Q. If something like that happened, where would Mr. Barr be? Would he be up on his Oregon ranch?

A. I would call his Oregon residence, his Oregon ranch.

Q. Then you would tell him that something unusual happened?

A. Yes, sir.

Q. He would be several hundred miles away?

A. Yes, sir; in case that anything unusual did happen.

Q. I see. Now, with regard to this irrigating, we have covered that with one exception: Did Mr. Clay Barr give you any lessons in irrigating before he left?

A. He showed me which ditches up there he wanted opened up at different times.

Q. Did he show you how to hold the water?

(Testimony of Perry Morter.)

A. Yes, sir; he did.

Q. Were you able to do it after he had showed you, or did it [293] run into the bottomland?

A. That is, he showed me how to plug the main ditches and build up the water in them to raise the water level high enough so that you could open them at various points and make the water run out.

Q. That is all he showed you?

A. Yes, sir.

Q. From then on you were on your own?

A. Yes, sir.

Q. It was something you had never done or tried to do before?

A. No, sir. I had never irrigated before.

Mr. Fertig: That is all. Thank you.

Mr. Kester: That is all.

(Witness excused.) [294]

HAROLD MORTER

was produced as a witness in behalf of the defendants and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Kester:

Q. Harold, you are the brother of Perry, who was just on the stand? A. Yes, sir.

Q. Where do you live?

A. I live at Doebay, Washington, at present.

Q. You work on a farm? A. Yes.

Q. Whose farm? A. Scott Barr's.

(Testimony of Harold Morter.)

Q. Have you worked on various ranches during your life? A. Yes, I have.

Q. What is your age now?

A. Twenty-six.

Q. How long have you been doing farm work?

A. I have been doing farm work in the West since 1948.

Q. Were you on the Meiss ranch during the summer of 1953? A. Yes, sir; I was.

Q. When did you come down there?

A. Well, it was around the 8th or 9th of May.

Q. Did you work during the planting? [295]

A. I did.

Q. What job did you have?

A. Well, I drilled, run disks, and also serviced equipment and harrowed some.

Q. How long were you there for the planting?

A. I was there until we was through.

Q. About when was that, do you remember?

A. Well, we was through about the 5th, the 5th to the 8th of June, along in there sometime.

Q. What was the weather like during that time?

A. From the time we went there until we finished seeding?

Q. Yes.

A. Well, it was a pretty nice day when we got there, and I think the next day was pretty nice, and then it rained a lot for the next two or three weeks. Up into June it rained a lot.

Q. Was the soil pretty wet during most of the planting season?

(Testimony of Harold Morter.)

A. Very wet. Very wet. Water on top of lots of it, just seeping out.

Q. Do you remember how much had already been planted when you got there?

A. Well, when we went on the ranch, why, there was a section in the southeast corner had been seeded, and what we referred to as the dobe ground over in here somewhere.

Q. The section in the southeast part, is that what has [296] been referred to as the weed patch?

A. That is correct.

Q. Who had done that seeding?

A. Well, I don't know who had done it. I understood that Bud was in charge while it had been done.

Q. But it was under the prior management?

A. That is right.

Q. Then after you finished seeding what did you do?

A. Well, I helped construct a canal out there to distribute water that was being pumped out of the lake to lower the lake.

Q. That was up on the sagebrush land?

A. That was up on the sagebrush.

Q. How long were you there during the summer?

A. Until about the 19th or 20th of June, along in there.

Q. Then where did you go?

A. I went back to Washington.

Q. Working on a farm?

(Testimony of Harold Morter.)

A. That is right.

Q. When did you come back to the Meiss ranch?

A. Well, it was in September sometime.

Q. You came back for the harvest?

A. That is right.

Q. Did you work in the harvest?

A. I did.

Q. What did you do? [297]

A. Oh, ran a combine, drove truck, and helped load grain.

Q. Had you run a combine before?

A. Yes, sir; I have.

Q. For how long? How many years have you had combine experience?

A. I think I put in about 160 days previous to going on that ranch to harvest.

Q. One hundred sixty days?

A. That is right.

Q. How many different harvests would that be?

A. About five.

Q. You were driving a combine during five years? A. That is right.

Q. What kind of a combine did you drive on the Meiss ranch?

A. Well, I first run the John Deere pull machines, and later I run the John Deere 55, which is a pusher.

Q. A pusher is self-propelled?

A. Self-propelled.

Q. That is one that came down from the Northern Oregon ranch?

(Testimony of Harold Morter.)

A. No, that is one he rented from Mr. Stevenson.

Q. Did you notice any unusual or excessive amount of grain being wasted in the fields during the harvest? A. No, I didn't, sir.

Q. What is the fact as to whether there was always a certain amount of spillage from any combine? [298]

A. Oh, yes, you can have a little loss of grain, a little spillage.

Q. Was there any more than you would ordinarily expect? A. Oh, no, sir.

Q. You say you occasionally drove trucks. Did you drive into town?

A. Yes. Yes, I did.

Q. With loads of grain?

A. With loads of grain.

Q. Did you notice this place where an endgate came loose and some grain was spilled?

A. Towards the tail end of the harvest there was one tailgate jiggled loose and let out some grain.

Q. Up until that time was there any unusual amount of grain spilled along the road?

A. No, you couldn't see any grain along there.

Q. Going back for a minute to the seeding, was there some area that was reseeded, seeded a second time?

A. Yes, there was a small area in that same plot of ground referred to as the spud ground. It was west of the spud ground. There was a small area there that was reseeded.

(Testimony of Harold Morter.)

Q. Why was that?

A. Well, it had got so wet that it kind of drowned out.

Q. How long were you down there then? When did you finish the harvest?

A. About the middle of October. We finished harvesting a [299] little before that, but we had a little grain to remove. We left there about the middle of October, or a little later.

Q. You stayed until the end of the harvest, did you?

A. Yes, I stayed until we was all through.

Q. You didn't go back afterwards?

A. No, sir; I didn't.

Mr. Kester: I think that is all.

Cross Examination

By Mr. Fertig:

Q. You say you had been out here in the West farming about how long?

A. Since 1948.

Q. 1948? A. That is right, sir.

Q. Whom have you been employed by since that time?

A. Harvey Barr and Clay Barr.

Q. Now you say you work for Scott Barr?

A. That is right, sir.

Q. That is another member of the same family?

A. Correct.

Q. Are you a member of the family?

A. Well, a distant relative.

(Testimony of Harold Morter.)

Q. What experience had you ever had with farming in an area and terrain like they have down there around Tule Lake and [300] Klamath Falls?

A. I wouldn't say I had—I had a little experience in Montana on similar terrain, but I wouldn't say it is a similar climate.

Q. A different climate?

A. Well, a little different, yes.

Q. An irrigated farm?

A. You wouldn't exactly call it an irrigated farm. On level soil like that, if it gets wet then you drain it.

Q. It is a little bit different than down here around Klamath? A. Yes, it is a little different.

Q. Then you farm a little differently in each area, don't you?

A. Oh, yes. Each area is farmed a little different.

Q. Each kind of soil requires a little different treatment to do its best? A. That is right.

Q. When you went down there the first time what was that date?

A. Well, it was on Sunday. It was the early part of May, around the 8th or 9th, or somewhere in there.

Q. And this place referred to as the weed patch, was that all planted? A. Yes. Yes, it was.

Q. Was wheat growing in it?

A. Was what growing in it? [301]

Q. What was growing in it?

A. Well, the grain was just coming up.

(Testimony of Harold Morter.)

Q. It looked pretty good?

A. Well, it was just coming up; just coming up.

Q. No weeds?

A. No weeds when we first went down there, no.

Q. Then you came back later, or did you stay on there for awhile?

A. I helped through the seeding until I left along somewhere in the latter part of June.

Q. In the latter part of June?

A. Yes. I don't know about the latter part. You see, we finished seeding sometime between the 5th and the 8th, and then I was there a little longer and helped on that dike, and then I left.

Q. In June? A. In June.

Q. You stayed there continuously?

A. I was there all the time.

Q. Was Clay Barr there all the time?

A. Yes. Yes, he was there. He wasn't there all the time, but he was there until we was practically through seeding.

Q. He wasn't there from the 5th to the 10th of June, was he?

A. No. I don't know whether that is the exact dates or not, but he wasn't there for a little while somewhere between there. [302]

Q. There was other times he was away too, wasn't he?

A. Overnight or gone maybe for a short trip up to his home in Oregon and back.

Q. How far is his home in Oregon from that ranch? A. Around 300 miles.

(Testimony of Harold Morter.)

Q. Now you stayed there. Did you watch the crop starting to come up during the latter part of May, especially around that weed patch area?

A. Well, they grew a little; not hardly any in May. In June they started progressing a little.

Q. Would you say they were progressing nicely in June?

A. Well, I don't know. It had rained so much, and parts of it was awful wet, and the grain didn't look so good. It showed signs of yellowness in spots.

Q. But it was growing?

A. It was growing a little.

Q. Were there any weeds then?

A. Well, not that I observed. There could have been, but I never went out and looked for weeds. I just looked at it as I drove by in a rig. If there was any weeds they was too small to see without getting right out there and looking for them.

Q. In other words, the crop was ahead of the weeds; is that right? If there were any weeds the crop was ahead of the weeds? [303]

A. Well, the crop was just up.

Q. Yes, but into June I am talking about now.

A. Yes.

Q. In June about how high was it?

A. Oh, I don't remember. It didn't have any height to speak of, but it was green. It had a green cover and looked green.

Q. Did it gain any height by the 10th or 12th of June? A. Not much.

Q. Six inches? A. Oh, no, no.

(Testimony of Harold Morter.)

Q. Not even that much? A. No.

Q. Now this dobe land, did you ever see that from the time you left in June until you came back in September? A. No, sir; I didn't.

Q. How did it look in June?

A. Well, it didn't look like there had been a very good job of seeding done to us.

Q. Had you done much seeding of this type of crops yourself?

A. No, sir; but the preparation of the ground didn't look very good to us.

Q. It didn't look good to you?

A. No, it didn't.

Q. That was your own personal opinion?

A. That is right. [304]

Q. With regard to the seeding do you have enough experience to form an opinion as to whether it was seeded properly or not?

A. The seed bed didn't look good. It was just—to anybody that is associated with agriculture and kind of thinking that way, it just didn't look good. That is all.

Q. Was the crop starting to grow?

A. Yes. Yes, it was coming up.

Q. Was it coming up to any height?

A. No, not to speak of.

Q. Just getting started. So when you left everything was in its infant stage, just budding out, and when you got back it was harvest time?

A. Well, there was none of it very high when I left because we had just got it in.

(Testimony of Harold Morter.)

Q. That is what I say. It was very small when you left? A. Most of it.

Q. Then you didn't come back until September?

A. That is right.

Q. So anything that took place with regard to the crops, or anything, between early in June and September you wouldn't know anything about?

A. No, sir.

Q. Did Clay Barr tell you that the dobe land was not properly seeded in May? [305]

A. I don't recall of him saying that it was.

Q. I see. He didn't say it was not properly seeded either, did he?

A. I don't remember that he said it was or wasn't, no.

Q. Now you were asked about unusual spillage along the road. What is usual spillage?

A. What is usual spillage?

Q. Yes. How much of a truckload should you lose on the way in over a five-mile stretch?

A. I don't see why you should lose any.

Q. You testified that you didn't see any unusual spillage. Now that means there was some wheat always around, doesn't it, falling off the trucks?

A. I don't recall of saying that.

Q. Maybe not. I thought I copied it. Was there wheat along this stretch of road that had fallen off the trucks? A. No, no.

Q. There wasn't any? A. No.

Q. In the rough stretch before you got to the paved stretch did you see any there?

(Testimony of Harold Morter.)

A. The only wheat I saw on the road was on the instance when the tailgate jiggled loose on the tail end.

Q. You didn't go back to town very much, did you?

A. Yes, I did quite a little. [306]

Q. There wasn't any?

A. Not that I noticed other than the instance of the tailgate.

Mr. Fertig: That is all, Mr. Morter.

Mr. Kester: Thank you, Harold.

(Witness excused.) [307]

WARREN FARNAM

was produced as a witness in behalf of the defendants and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Kester:

Q. Where do you live, Mr. Farnam?

A. Sir?

Q. Where do you live?

A. Macdoel, California.

Q. You live on the Meiss ranch now?

A. Yes, sir.

Q. Do you now operate the Meiss ranch?

A. In conjunction with my brother.

Q. For how long have you been more or less acquainted with the Meiss ranch?

(Testimony of Warren Farnam.)

A. Well, the first time I saw it was the 21st day of August, 1953.

Q. You went down there?

A. No, I came up there. I was in the air force at Sacramento, and I met my brother and my father down there to look at the ranch. I got a 24-hour pass.

Q. You were looking at it with the notion that you might be interested in taking it over?

A. That is right. My brother had talked to the real estate man that had the place listed with Clay. I was due to get out of the service in January, and wanted to try to line up some [308] place to move to. So he called me and made an appointment to meet him, and we met there on the 21st day of August.

Q. Had you had farming experience before you went in the air force?

A. Yes, sir. I farmed with my dad from '36 to '41, and then my brother and I farmed in Benton County, Washington, in what they call the Horse Heaven country, for five years, until I was recalled for the Korean war.

Q. What kind of farming had that been, mostly?

A. Mostly stock and grain in Whitman County, and dry land wheat operation in Horse Heaven.

Q. Now did you make a deal with Clay Barr to take over his lease there after the harvest of 1953?

A. Yes, sir. My brother negotiated most of the deal, since it took about a week for me to get out of the service. I requested an early out, and I ar-

(Testimony of Warren Farnam.)

rived back and went through by the ranch around the first of September, or the 2nd of September, I believe it was.

Q. Now I believe the assignment of lease is already in evidence. After that was signed when did you come onto the place again?

A. Well, after the 2nd—I believe it was the 2nd day of September my wife and children and myself drove by. We stopped by about 15 minutes. I don't remember the dates, but it seems to me like it was around the 10th, or somewhere in [309] there my brother and his father-in-law and brother-in-law and myself came back down to the Meiss ranch.

Q. Were you on the ranch enough during harvest to pay any particular attention to the harvest that was going on?

A. No, sir. I didn't see much of the harvest. Actually, the only combines I was even close to were the ones down there in the weed section. One of my cousins happened to be operating the self-propelled. We sent him down to help Clay finish up there so we could get the equipment. In fact, we sent two men down there. And I went out to the combine and hollered at him a couple of times, but I made no observations about the grain or the harvest. Actually it was late and we were worrying about plowing and diking.

Q. When did you come in then to take over?

A. Pardon?

Q. When did you take over?

A. Theoretically we were supposed take over on

(Testimony of Warren Farnam.)

the 1st of October, but in the lease agreement or the purchase agreement with Clay I think it was stated in there that as soon as he finished the harvesting we were to get the equipment. And they had some grain to haul after they had finished harvesting, so we didn't get the trucks at the same time. And then the potato people used the trucks. I believe it was around the middle of October sometime before we got two tractors to go to work on the dike with.

Q. You had actually started in, then, a little bit before Clay was all through?

A. That is right. I was sleeping in the bunk-house with Clay. The houses were occupied by my brother and his family, who first came down there, and by Bud Stevenson and his wife and the cook that lived there. My furniture was in Sacramento and my family was in Whitman County.

Q. You mentioned some plowing. Did you do some plowing that year? A. Yes, sir.

The Court: What is the point of that?

Mr. Kester: It relates to the condition of the field after the harvest, your Honor.

A. Around a thousand acres, I believe.

Mr. Kester: Q. Did you get out in the field yourself in connection with that? A. Yes.

Q. Did you find any unusual or excessive amount of grain lying in the fields left from the prior harvest when you got into your plowing?

A. Well, I never paid any real close attention to the windrows, but I did see a few piles of grain where an elevator plugged up, which is natural. We

(Testimony of Warren Farnam.)

had it this year. We have had it both years we have operated the ranch. You plug up an elevator with damp grain, and usually the machineman will [311] kick it around with his foot so a cow won't get three or four gallons of it, if there happens to be that much. But I never noticed any excessive waste behind the combine. I never made an effort to look for it.

Q. If there had been a lot of grain lying around would you have noticed it?

A. I will tell you when I would have noticed it. When you burn stubble if there is any wheat to amount to anything lying in the windrows it sticks up there where the geese can really get to it.

Q. Did you notice any?

A. I didn't notice so much in the area we burned.

Q. You operated the ranch in '54 and '55, you and your brother? A. Yes, sir.

Q. What was your experience with the crops in those years?

Mr. Tonkoff: That is objected to.

The Court: Objection sustained.

Mr. Kester: Counsel was permitted, your Honor, to offer evidence of the production on other places, estimates of production.

The Court: At that time, the same time, the same year, 1953.

Mr. Kester: No, your Honor. They went clear back to '47.

The Court: I shouldn't have let them do it. I

(Testimony of Warren Farnam.)

suppose [312] he may state very generally if he has had satisfactory results or not.

A. Due to the frost we haven't, sir.

Mr. Kester: Q. Have other factors entered into it?

A. Yes, sir. This year we had a dry year, and some of the ground we have had tested and found that it is carrying a definite alkali content that will not raise grain.

Q. Have you made a study of the soil conditions, the soil on that ranch?

A. Yes, sir. I have had the United States Soil Conservation test it and the Simplot Soil Builders from Idaho test it.

The Court: Don't give the details.

Mr. Kester: Q. You have made a study?

A. Definitely.

Q. What have you found with respect to the nature of the soil there?

A. The soil in the biggest share of the bottom-land, the good land, is good soil. And the so-called weed section I keep hearing about is alkaline. We haven't raised a crop on it in two years.

Q. Have you made any effort to counteract the alkali?

A. Yes, sir; fertilizer at \$12 an acre on 450 acres of it in 1955, this spring.

Q. It still didn't make a crop?

A. Definitely not. We plowed it up. [313]

Q. What about the dobe ground up in the west end?

(Testimony of Warren Farnam.)

A. We experimented with that last year and had a fine stand of foliage on it. I would say that we cut somewhere around 1500 pounds to the acre on it. But it had a definite frost to it. We couldn't absolutely separate it from the rest of the grain, but I would guess 1500 pounds. It is a very good type soil. The soil itself is good on it.

Q. Have you tried to irrigate it?

A. Not since we have been on the ranch. We have never been associated with an irrigated ranch before, and we requested the help of the Soil Conservation Service and different farmers there to help us out on it and teach us something that we didn't know. Some recommended some watering. The Soil Conservation and the Oregon——

Mr. Tonkoff: That is hearsay, your Honor, and I object to it on that ground.

The Court: Continue.

A. The Oregon State Experiment Station said we didn't have the water to do it with.

Mr. Kester: Q. Have you made a study of the water on the ranch? A. Yes, sir.

Q. What have you found with respect to the quality of that water?

A. The lake water on the ranch we had tested, and the Oregon [314] State Experiment Station——

Mr. Tonkoff: That is hearsay. I object to it.

The Court: Continue. Objection overruled.

A. The Division of Water Resources of the State of California tested it and told us we would

(Testimony of Warren Farnam.)

be using very toxic water if we irrigated with any lake water any time of the year.

Mr. Kester: Q. Have you ever examined and studied various soil maps showing the nature of the soil there? A. I have.

Q. Is there any Class 1 soil on the ranch?

A. No, sir.

Q. What preparation of the seed bed did you make on the dobe ground before planting?

A. In the spring of 1954 we plowed, disk-plowed, the land three times and harrowed three times before we seeded it in, and definitely worked it. It has to be mulched. Mr. Stevenson, Sr., told us how to farm that.

Q. Did you do it the way he told you?

A. Yes, sir. He didn't necessarily say we had to do it six times, but he said that we had to work a mulch on top of the ground.

Q. Did that prove out?

A. Yes, it did. If it hadn't been for frost we would have had a good crop on it.

Q. Without irrigation? [315]

A. Without irrigation.

Mr. Kester: That is all.

Cross Examination

By Mr. Tonkoff:

Q. Mr. Farnam, you prepared the land this spring for seeding and then you didn't seed for two weeks, did you?

A. On which land, sir?

(Testimony of Warren Farnam.)

Q. On this ranch. To make a long story short, after you prepared the land for seeding you couldn't get finances and therefore you were two weeks late?

A. No, I wouldn't say that. When we reached the dobe ground, which was about halfway through the seeding season, the minute that was prepared we seeded it. I will agree that when we first got some of the good ground, which you people call the potato section—we did have it prepared and didn't have adequate financing to get it seeded, but that had nothing to do with the crop.

Q. That makes some difference, doesn't it, if you delay it two weeks?

A. It made it more expensive, but we had a fine crop.

Q. To make a long story short, this is good property, isn't it? A. Yes, it is.

Q. Have you examined that map of the classification of the [316] land down there, the Government map, where it shows 90 per cent of this land as Class 1 land, Mr. Farnam? Do you see Meiss Lake there, the land west of the lake?

A. Well, you are right, sir. According to my studies on it, this is a Department of the Interior map, which since last year has been outlawed against making soil conservation tests. Their classification is according to the slope and the terrain of the soils. This Soil Conservation map right down here, which shows the peat land is Class 2, is the only legal map in existence on that soil, from my studies on it.

(Testimony of Warren Farnam.)

Q. You say this land is valuable land?

A. Yes, sir.

Q. It sold for two million dollars, did it not, in this month, to Doris Day and McCrea, actors?

A. I would say it was near two million.

Q. Have you paid off these notes that you owe Mr. Barr, one note that is for \$5,000 due June 1st, 1954?

A. No.

Q. Have you paid the note that was due on October 1st, 1954, for \$7,500?

A. No, sir.

Q. Have you paid off the \$2,500 note due October 1st, 1954?

A. We have that note back.

Q. What is that?

A. We have that note. [317]

Q. Were you subpoenaed to come up here?

A. Sir?

Q. Were you subpoenaed to come here?

A. No, sir.

Q. You and Mr. Barr have been friendly for a number of years, haven't you?

A. I met Mr. Barr on a lease deal in 1949, I believe it was. That is the only time I have ever met the man.

Q. Don't you live in the same part of the country?

A. I knew his father by sight and I knew his reputation from Whitman County.

Q. He was the one that introduced you to this

(Testimony of Warren Farnam.)

property down here and took you down there and showed it to you?

A. No, sir. The real estate man in Spokane did.

Q. Is that Higgins?

A. No, sir.

The Court: It doesn't make any difference. I don't care anything about that.

Mr. Tonkoff: That is all.

(Witness excused)

Mr. Kester: You Honor, I think it will not be necessary to call Roy Farnam. However, I would like to offer in evidence the original deposition of Mr. Kirschmer, which is already in the Court's file, and the exhibits referred to therein, which I believe are attached to it; also the original deposition of Mr. Hofues, which is in the Court's file. I have here the exhibit that was identified at that time, which I also offer in evidence, which is a lease to Jack Ratlaff on some of the potato ground.

The Court: Admitted.

(The deposition of Frank Kofues was received in evidence; and the lease above referred to was received and marked Defendants' Exhibit 19.)

Mr. Tonkoff: You Honor, I offered Kirschmer's deposition on our case.

Mr. Kester: You offered Kirschmer's deposition?

Mr. Tonkoff: Yes.

Mr. Kester: It is already in evidence, then. I

wasn't sure when you offered your depositions, Mr. Tonkoff, whether you excluded the depositions of people who testified in person. Did you mean to offer all the depositions taken also?

Mr. Tonkoff: No, because I felt when they testified that the Court would hear their testimony.

Mr. Kester: That is my understanding, too.

The Court: You gentlemen state in the record at recess or at the conclusion of the case, if you have any doubt about the state of your record on your depositions, and whatever ones you offer are now and will be admitted subject to any objections.

Mr. Tonkoff: I have offered them. There is no doubt in my mind.

Mr. Kester: That concludes our case.

The Court: Can you finish your rebuttal by 1:00 o'clock?

Mr. Tonkoff: I don't think so, your Honor.

The Court: How much rebuttal will you have?

Mr. Tonkoff: I will have Mr. Stevenson, Sr., and Mr. Stevenson, Jr. And, your Honor, while we are on this point—

The Court: Before you leave this point, they have testified in great detail. I don't want you to go over the same ground with them.

Mr. Tonkoff: I don't intend to.

The Court: What other rebuttal do you have?

Mr. Tonkoff: Your Honor, in this situation—I don't know how the Court feels about it—there has been testimony introduced as to which I feel I should take the stand.

The Court: You may take the witness stand, but

under the rules of this Court and most courts I know of you will be precluded from arguing the case.

Mr. Tonkoff: Yes. If I take the stand I will not argue the case, your Honor.

The Court: All right. You can decide that during the lunch hour. How much rebuttal are you going to have besides the two Stevensons and yourself? [320]

Mr. Tonkoff And Mr. Welch.

The Court: We will come back at 1:30. I hope we get through in an hour, and you will then be prepared to argue.

(Thereupon a recess was taken until 1:30 p.m. of the same day, at which time Court reconvened and proceedings herein were resumed as follows:)

Mr. Holst: Your Honor, I would like to make a motion for the Court's consideration.

At this time, may it please the Court, the plaintiff respectfully moves that the document in evidence which purports to be the resignation of Horton Herman, who was named as an original trustee in the Declaration of Trust, which resignation was accepted and confirmed by all of the beneficiaries except one, that that resignation be accepted by this Court and this Court adopt the resignation of Horton Herman as the Trustee, and will then be an accomplished fact.

This motion is based upon the fact, may it please the Court, that the trust res is in the custody of this Court and this Court has jurisdiction over the

trust, and the majority of the beneficiaries having requested his resignation, and his own deposition which is a part of the record in this case shows that Mr. Horton Herman himself testified that if the matter had been brought into court he would ask to be removed as trustee.

The Court: I will reserve decision along with all the other reserved questions in the case.

Mr. Holst: At this time I would like to make the following motion; that there be joined as parties plaintiff the following persons: Mr. E. J. Welch and Viola Welch, residing in the State of Washington; Roland P. Charpentier and Effie Charpentier, husband and wife, who reside in the State of Idaho, and Honorable John W. Cramer, who also resides in the State of Idaho.

I make this motion that they be joined as parties plaintiff upon the grounds that they are present in court and duly authorized to do so. They are beneficiaries under this trust.

The Court: The decision on that is reserved.

JAMES C. STEVENSON, Jr.

was recalled as a witness in behalf of plaintiff, in rebuttal, and was further examined and testified as follows:

Direct Examination

By Mr. Tonkoff:

Q. Mr. Stevenson, on or about the 15th day of September of 1953 did you have a conversation

(Testimony of James C. Stevenson, Jr.)
with Mr. Clay Barr in Macdoel or in the vicinity
of the ranch? [322]

A. Yes, I did. I went to Klamath Falls with
him.

Q. At that time what did Mr. Barr tell you in
connection with this litigation?

A. He asked me if I would step out of this
litigation; that he would give me copies of papers
to prove that I could get my \$15,000 out of my
ranch agreement.

Q. Where did he make that statement to you?

A. He was in a car somewhere between Macdoel
and Klamath Falls.

Q. Now, Mr. Stevenson, was there any method
of irrigation down there besides the ditches?

A. Oh, yes. There is a sprinkling system on the
ranch.

Q. How large is the sprinkling system?

A. I believe it is a half mile long.

Q. Was that available during the season of
1953? A. Yes, it was.

Mr. Tonkoff: That is all, your Honor.

Mr. Kester: No more questions.

(Witness excused) [323]

EDWARD J. WELCH

was recalled as a witness in behalf of plaintiff, in rebuttal, and was further examined and testified as follows:

Direct Examination

By Mr. Tonkoff:

Q. You are Mr. E. J. Welch, who has already testified in this case?

A. That is right.

Q. You are still under oath. Mr. Welch, is the type of combine operation that is necessary to combine grain on the land here under discussion the same type of combining that you do lands in other same type of combining that you do on land in other places throughout the Northwest?

A. No.

Q. Can you tell the Court the difference in the system of combining that is necessary, taking into consideration the land that is here in controversy?

A. Well, I think in dry land combining you have a different condition there. You can travel faster. You have less foliage. On the other you have got a lot of foliage. Therefore, you have got to go slower in order to separate your grain properly. Does that fully answer your question?

Q. Yes. You were present during the harvest, were you?

A. I was.

Q. Did you tell them anything about the way they were harvesting? [324]

A. I wasn't allowed to under our agreement.
Mr. Tonkoff: That is all.

(Testimony of Edward J. Welch.)

Cross Examination

By Mr. Kester:

Q. What do you mean, you were not allowed to under your agreement?

A. We had an agreement with those people that we were not to interfere in any way with the operation.

Q. You are referring to the assignment and the Declaration of Trust? A. That is right.

Q. That is the agreement?

A. That is right.

Q. You don't claim that there was any agreement other than what appears in the written document, do you? A. No.

Q. The only difference in combining on dry land and irrigated land is in the speed that you can operate?

A. That is right. That is the big difference. That is the biggest difference.

Q. The only difference there is that irrigated grain is apt to be a little heavier than dry land grain, isn't it? A. That is right.

Q. Though that doesn't have anything to do with the nature of the farming? It is the consistency of the grain itself, isn't it?

A. Well, it is just a matter of harvesting practice. It wouldn't be the farming, certainly. It would be the way you run your combine.

Q. Yes, but the difference is based on the consistency of the grain itself; isn't that so?

(Testimony of Edward J. Welch.)

A. That is right, how heavy it is and what the condition is.

Mr. Kester: That is all.

Mr. Tonkoff: That is all.

(Witness excused) [326]

JAMES C. STEVENSON

was recalled as a witness in behalf of plaintiff, in rebuttal, and was further examined and testified as follows:

Direct Examination

By Mr. Tonkoff:

Q. Mr. Stevenson, did you ever make any statement to anyone that the property where the weeds were located you had not farmed in the previous two years because of the weeds?

A. No, sir.

Q. Had you produced crops on that prior to that time, prior to 1953? A. Yes, sir.

Q. At one time how many harvesters did you have harvesting in that area?

A. We have a moving picture of this particular spot where these weeds are. It just happened to be that the harvesters was all in the field when we took the picture, and there was 13 harvesters in there. And the harvesters was—the biggest one was a 20-foot cut, and most of them was 16-foot cut harvesters. And they was working in that field. They was working in that field where the weeds was supposed to be.

(Testimony of James C. Stevenson.)

Q. What part has Mr. Stevenson, you son, taken in developing this ranch?

A. What part did he take?

Q. What did he do in connection with the development of this ranch? [327]

A. The boy?

Q. Yes.

A. He was the foreman on the ranch, and he done a lot of repair work and mechanic work.

Q. In your opinion do you feel that he is a competent operator?

A. I recommended him very highly to Mr. Hofues when he bought the ranch.

Q. Mr. Stevenson, was there any other way of irrigating that property besides the ditches that were there?

A. Yes, sir. We had a portable spray rig. It wasn't a spray rig; it was a sprinkler system. It had 32 sprinklers on it, and it would reach approximately a quarter of a mile at a time. It had 32 sprinklers on it. We used this sprinkler on rough ground, where the water would run off too fast to irrigate, we used this sprinkler system.

Q. What was the value of that machinery in 1953 or the fall before when you turned it over to Mr. Hofues?

A. When we turned it over to Mr. Hofues we had a bank appraiser and one of the big machinery outfits appraise the machinery. There was \$150,000 worth of machinery on the ranch.

(Testimony of James C. Stevenson.)

Q. Was there adequate machinery there to cultivate that ranch?

A. There was adequate machinery to do anything that was supposed to be done on the ranch.

Q. What is the most that you have taken off of there in crops prior to 1953?

Mr. Kester: If the Court please, I understood——

The Court: Answer.

A. We took off 45 carloads of barley in '47.

The Court: Did you take off \$800,000 in any one year? A. Close to it.

Mr. Tonkoff: That is all, your Honor.

Cross Examination

By Mr. Kester:

Q. This year you had 13 harvesters in the weed patch, was that also '47?

A. I don't think it was. I think it was the year before that.

Q. 1946?

A. It was right in that particular time, '47 or '48, one or the other. I think maybe it was '47.

Q. That was the best year the ranch ever had?

A. That was the first year we had all the crop in, all the grain in.

Mr. Kester: That is all.

(Witness excused)

Mr. Tonkoff: We rest, your Honor. [329]

The Court: Surrebuttal?

Mr. Kester: One question, please.

CLAY BARR

one of the defendants herein, was recalled as a witness in his own behalf, in surrebuttal, and was further examined and testified as follows:

Direct Examination

By Mr. Kester:

Q. Clay, Bud Stevenson just testified a moment ago that you and he had a conversation where you said that if he would stay out of this lawsuit you would see that he got \$15,000. Did any such conversation ever take place? A. No.

Q. Did you ever have any conversation with him on the trip to Macdoel in connection with the scales? A. Yes.

Q. What was that conversation?

A. He went to Klamath Falls with me in order to get the bond to legally license the scales.

Q. What was the date of that, approximately?

A. Oh, it was just ahead of the harvest there sometime. We hadn't started loading out any grain yet.

Q. What was the conversation?

A. Oh, he had understood there that the Farham boys was coming in to take over the place, and he had also understood that they was buying the property, after they took my lease they was negotiating to buy the property.

Q. That would be buying from Hofues and Kirschmer?

A. Yes, buying from Hofues and Kirschmer.

(Testimony of Clay Barr.)

And he was telling me of his agreement if the place was sold that he would get \$15,000.

Q. That was his agreement with Hofues and Kirschmer?

A. Yes, that was under his agreement with the place, and he was wanting to know what I knew about the sale of the property.

Q. What did you tell him?

A. I told him they was negotiating; that I had heard they was negotiating, but as far as making a sale I didn't know whether it had been made or when, or anything. It wasn't my business, actually.

Q. Was there any discussion at all about this lawsuit or a lawsuit like this?

A. I didn't know for sure that there was a lawsuit coming there. There was no evidence. We hadn't got the crop harvested. We didn't know how much grain there was going to be, and there was no evidence for sure——

Q. Did you ask him to stay out of any lawsuit?

A. No.

Q. Did you make him any promises as to what you would do if he did or did not get into a lawsuit? [331]

A. No. Lawsuits wasn't a consideration of our conversation.

The Court: Who owns the place now, do you know?

A. It is my understanding that there was a corporation formed and bought the place, which included three or four of the movie stars.

(Testimony of Clay Barr.)

The Court: Whom did they buy it from?

A. I couldn't rightfully say for sure.

The Court: The Farnam boys?

A. I think so, but I am not sure.

Mr. Kester: That is all.

Cross Examination

By Mr. Tonkoff:

Q. As a matter of fact, the Farnam boys had already purchased the lease from you prior to September 15th, 1953, hadn't they Mr. Barr?

A. Yes.

Q. What occasion was there for him to talk about whether or nor they were going to buy the place on September 15th when you were going to town?

A. They wasn't satisfied with the lease. They was wanting to own the place too, I guess.

Q. Well, you were out of it at that time?

A. Yes, I was out of it.

Q. What discussion could you possibly have with Mr. Stevenson concerning the property there?

A. He was wanting to know in regard to whether he could collect his \$15,000, I guess, and what I knew about it.

Q. You at that time didn't make any statement to him that if he kept out of this Welch affair and your affair that you would show him how to get that \$15,000?

A. I didn't have any way of showing him. It wasn't my business. I couldn't give him anything.

Mr. Tonkoff: That is all.

(Witness excused)

Mr. Kester: Before we commence argument, may I have the record show I renew my motion to dismiss that was originally filed, particularly on the two grounds mentioned in the memorandum that was submitted: defect of parties and failure of authority as Trustee——

The Court: The decision on all prior motions that have previously been reserved are further reserved until a later stage of the case.

Proceed to argument.

(The cause was argued to the Court at length by counsel for the respective parties, and thereafter the Court took said cause under advisement.)

[Endorsed]: Filed February 2, 1956.

[Title of District Court and Cause.]

ORAL DEPOSITION OF A. G. KIRSCHMER

Amarillo, Texas, January 5, 1955

This deposition is taken pursuant to notice, however the notice gave as the location of the deposition 4501 West 2nd Street in Amarillo, Texas, which is the residence of Mr. Kirschmer, and by agreement the parties have changed the place of the deposition to this office, which is at 3314 West 6th Street in Amarillo, Texas.

Mr. Kester: Is that satisfactory?

Mr. Tonkoff: Yes, sir.

Mr. Kester: Mr. Kirschmer, before beginning questioning you, under the rules of Federal Court you have the right to read over the deposition after it is transcribed and sign if you wish to; however it is customary to waive the signature and rely on the Court Reporter to take it correctly; and as far as we are concerned that is all right with us if it is with you.

Mr. Kirschmer: That is all right.

Mr. Tonkoff: It is all right with me.

Mr. Kester: I believe under the rules all objections will be reserved until the trial except with respect to the form of the questions. Is that satisfactory with you?

Mr. Tonkoff: That is all right.

Answers and deposition of A. G. Kirschmer, taken at the request of the Defendants, on the 5th day of January, 1955, before Joe F. Witt, a Notary Public and Official Court Reporter in and for Potter County, Texas, pursuant to the foregoing stipulations of counsel.

A. G. KIRSCHMER

being first duly cautioned and sworn by the Notary as a witness in the above entitled and numbered cause, testified as follows:

Direct Examination

Mr. Kester: Mr. Kirschmer, we are about to ask you some questions with respect to this law suit,

(Deposition of A. G. Kirschmer.)

which will be in lieu of your testimony at the trial in the event that you are unable to attend the trial when it comes up.

Q. (By Mr. Kester): Will you first state your name and your address?

A. A. G. Kirschmer, 4501 West 2nd.

Q. In Amarillo, Texas?

A. Amarillo, Texas.

Q. And are you a resident of Texas?

A. Yes, sir.

Q. How long have you lived in Texas?

A. About two and one-half years.

Q. As one phase of this case, Mr. Kirschmer, there has been a request made to the Court that you be named as an additional defendant, and there are matters now pending before the Court in that regard. I will ask you whether you have been served with any summons or complaint in this case within the State of Oregon? A. No.

Q. Did you or your family receive a copy or summons and complaint delivered here in Amarillo, Texas? A. No summons, no.

Q. Was a copy of a complaint left for you here in Amarillo, Texas at your residence?

A. I don't remember that one ever come here.

Q. In any event you haven't been served with any paper from the State of Oregon?

A. No, sir, that is right.

Q. This case, Mr. Kirschmer, involves the operation of a ranch which the parties have described as

(Deposition of A. G. Kirschmer.)

the Meiss Ranch in Northern California. Are you familiar with that ranch by that name?

A. Yes, sir.

Q. When did you first become acquainted with that ranch?

A. Oh, the first time I seen it was about the first of June, 1951—1952, let me see, that was 1952.

Q. What is your line of work, Mr. Kirschmer?

A. Farming.

Q. How long have you been engaged in that work?

A. All my life.

Q. What type of farming particularly have you been acquainted with?

A. Diversified farming, corn, wheat, the row crops, maize and so on.

Q. And in what general part of the country have your farming operations been?

A. Western Nebraska and Western Kansas, Eastern Colorado.

Q. What type of farming did you do in Colorado particularly?

A. Well, we done wheat farming and irrigated row crop farming.

Q. Are you interested in the grain elevator business in Colorado?

A. Yes.

Q. Now, here in Texas do you have farming operations here?

A. Yes, sir.

Q. What is the general nature of your farming operation here?

A. Oh, irrigated farming.

Q. What kind?

A. Irrigated farming; it is all irrigated here.

(Deposition of A. G. Kirschmer.)

Q. What type of crops particularly do you have here? A. Primarily cotton.

Q. Over the years have you been familiar with grain farming and raising of grains of various kinds? A. Yes, sir.

Q. You indicated all of your life you had been a farmer; approximately how many years have you been acquainted with farming as it relates to grains particularly?

A. Oh, since I have been growing grain, to a large extent, was probably since 1934, about, I have been a large grain farmer since then.

Q. Have you had grain farms that would be considered large operations? A. Yes.

Q. How many acres for example in grains have you had at any time?

A. Our largest operations where it was all cultivated was around seventeen or eighteen thousand acres.

Q. Where was that?

A. Eastern Colorado and Western Kansas.

Q. Was that irrigated grain?

A. No, sir, it was primarily dry land.

Q. Now, how did you first become acquainted with the Meiss Ranch in California?

A. At the request of Mr. Hofues, I went up in June, 1952, and inspected it.

Q. That is Mr. Frank Hofues? A. Yes.

Q. His name is H-o-f-u-e-s? A. Yes.

Q. And what type of an operation is the Meiss

(Deposition of A. G. Kirschmer.)

Ranch, what was it at that time, you describe it generally for us.

A. It was a grain operation primarily, and livestock, with a little diversified farming, with a little clover, but primarily barley and oats.

Q. Will you tell us approximately the size of the entire operation?

A. Around three thousand acres; of course that didn't comprise near all the land.

Q. How much land was involved, just approximately in the entire ranch, without trying to break it down as to different types?

A. It would be around four thousand acres, the total farming operations.

Q. Can you describe for us generally how the ranch was situated with respect to the land there, what the lay of the land was?

A. Originally it was a lake bed cleared up and there was a levy put up to hold the water out of the lake bed during the farming seasons; so when that dried up in the Spring of the year they went to farming it; after they got it plowed they would attempt to cultivate it and plant the grain.

Q. Was this lake bed relatively flat?

A. Yes, very flat.

Q. Around the fringes of the lake bed what type of land was there?

A. That was hard gumbo; it had some slope to it.

Q. Did the slope go up the foothills, up toward the mountains?

A. Yes, sir.

(Deposition of A. G. Kirschmer.)

Q. The lake bed itself, what kind of land was it, generally speaking?

A. Oh, it was just—the main lake bed was what they called peet soil. I don't know what other name you would give it. They called it peet, because it was made up primarily of vegetable matter. I think they gave it as ninety percent, over ninety percent organic lake bed, the vegetation predominated.

Q. Now, in order that we may orient ourselves a little bit, where, with respect to the ranch, were the main ranch buildings, on which side? Would it be on the North side, South, East or West of the ranch?

A. If I tell you where it seems to me, it would be wrong. It is supposed to be on the West side of the place—no, South, South, you look North from the place over the farming operations.

Q. Is it situated near a town?

A. Yes, it is reasonably close to Macdoel.

Q. M-a-c-d-o-e-l? A. Yes.

Q. California? A. Yes.

Q. About how many miles from Macdoel is the main ranch building?

A. Approximately five miles from the ranch buildings to town.

Q. Now, this levy that you spoke of, was that in existence when you saw the ranch the first time?

A. Yes.

Q. Generally speaking, which way did that levy extend across the ranch?

A. Primarily North and South.

(Deposition of A. G. Kirschmer.)

Q. Now, is there a well defined water course coming down through the lake bed there?

A. Yes.

Q. Does that have a name? Do you know? Is there a name for it?

A. No, just three mountain streams that flow upon the place; I don't remember that they had a name.

Q. Could you describe for us how this levy works from the standpoint of blocking off the water from certain parts of the ranch?

A. Well, the levy was put up to retain the water during the growing seasons so you could plant the crops and keep from flooding them out too for the summer months; it was made to hold her back during the summer months.

Q. Did it retain the water on the East side or the West side of the levy?

A. On the East side.

Q. On the East side. Now, the water that came down from the mountains, how did that get over—well, first let me ask; from which direction did the water come out of the mountains?

A. It come from the Southwest and the North side, Southwest and North side of the ranch, as I get it, down the various streams. In the winter time it didn't follow the stream at all; it just came on off of the mountains on the Meiss Ranch.

Q. Now, was there any provision made for getting that water into the area on the East side of the lake? A. Yes.

(Deposition of A. G. Kirschmer.)

Q. How did that work?

A. Large capacity pumping stations.

Q. Were there ditches and canals to collect the water? A. Yes, sir.

Q. And then there were pumping stations to pump the water over the levy into the East side?

A. Yes.

Q. And if I understand you correctly then the East side of the levy was a lake?

A. That is right.

Q. And the West side of the levy would be to some extent drained by these canals?

A. That is right, when you keep the water off, that would be your valuable land.

Q. Now, the situation as you have described it, is that the way it appeared to you when you first saw the ranch?

A. Quite so. I didn't get a true picture of it just one time looking over it, there was quite a lot to see, but that is about the way it looked to me.

Q. And has that stayed pretty much the general picture of the place ever since? A. Yes.

Q. Now, when you went there to look at it, who was on the place? A. Jim Stevenson.

Q. Was he the owner? Do you know?

A. Yes.

Q. Now, you said you were looking at the instance of Mr. Hofues; did you then report to Mr. Hofues on what you found?

A. Yes, that is right.

Q. Did Mr. Hofues subsequently enter into an

(Deposition of A. G. Kirschmer.)

arrangement for the purchase of the ranch?

A. About, yes, about sixty days later he consummated the deal with Sterling Higgins.

Q. Who is Sterling Higgins?

A. Sterling Higgins was a real estate broker that worked the deal up.

Q. Where is Mr. Higgins located?

A. I believe he is in Spokane, Washington—wait a minute, I think it is Portland.

Q. Portland?

A. Spokane—I don't know, it was one or the other. I never met him. He always looked me up.

Q. In any event did he have the ranch listed for sale as a broker? A. Yes.

Q. And when Mr. Hofues requested you to examine the ranch was it having in mind the possibility that you would enter into the deal with Hofues?

A. Yes, he mentioned that to me at the time that I could buy into the deal if I wished to.

Q. Did you subsequently do that?

A. Yes, later on I did, after he contracted for it, made the deal, I later went in the deal with him.

Q. About when was it that you went into the deal if you recall, approximately?

A. September, 1952.

Q. And that then resulted in a purchase by yourself and Mr. Hofues from Mr. Stevenson through Mr. Higgins? A. That is right.

Q. Was that on a conditional sale's contract?

A. Yes.

(Deposition of A. G. Kirschmer.)

Q. And did you purchase all the equipment of the ranch with the ranch?

A. Yes, all the equipment and the land proper, buildings and all that, all the assets.

Q. Now, did Mr. Stevenson himself continue to have any interest in the place after the sale?

A. No.

Q. Did he stay on in that vicinity?

A. Yes.

Q. What land did he occupy?

A. He occupied the main headquarters, that is the buildings of the main headquarters, until about January of 1953.

Q. 1953? A. Yes.

Q. Now, did Mr. James Stevenson have any other land in the immediate vicinity?

A. I don't think so, no.

Q. When you and Mr. Hofues purchased the property was the ranch subject to any existing leases to anyone?

A. I think yes, just for a one year lease.

Q. And to whom was that?

A. Had Noakes.

Q. Noakes?

A. Noakes, Had Noakes, H-a-d-l-e-y, I think Hadley is the name? It is just Had they call him.

Q. Would that be James H. Noakes, H. for Hadley, would that be it? A. Yes, J. H. Noakes.

Q. Now, what arrangements did you and Mr. Hofues make for the management of the ranch after you purchased it?

(Deposition of A. G. Kirschmer.)

A. I employed the son of Mr. Stevenson, known as Bud Stevenson.

Q. Do you know his given name?

A. No, that is all I know, Bud, that is all I ever heard.

Q. You employed him as manager?

A. Yes.

Q. Generally, without going into detail, what kind of arrangement did you have with him?

A. Well, of course, originally when we took over we merely hired him to harvest that crop.

Q. In other words, you came in at a time when the crop was about ready for harvest?

A. Yes, it was getting pretty close to harvest, so he went ahead with the equipment that was on the place and harvested the crop.

Q. Was there a crew of men on the place to work it?

A. Yes, he got some more men that was required to put over the harvest.

Q. Had Bud Stevenson been familiar with the place during the time his father owned it?

A. Yes, sir.

Q. Had he lived and worked on the place while his father owned it?

A. Yes, sir.

Q. Did Bud Stevenson then proceed to proceed with the harvest in the Fall of '52?

A. Yes.

Q. Did that arrangement with Bud Stevenson then continue in '53?

A. No, we made a new agreement with him for '53.

(Deposition of A. G. Kirschmer.)

Q. What was the nature of that agreement?

A. We hired him for a given salary, plus a small percent of the net profit.

Q. And was that to run for the entire season of 1953?

A. That was the way the contract was drawn up, yes.

Q. And did he then continue with the management of the ranch into 1953?

A. That is right.

Q. Do you know what work he did on the ranch in the Spring of '53?

A. Well, he planted what crops he could plant, so he claims, up to a certain time until we got there, which was around the first of May.

Q. Did you and Mr. Hofues visit the ranch about the first of May in '53? A. Yes, sir.

Q. What was the occasion for your visit? What was the reason for going?

A. To check up on the operation.

Q. What did you find when you got to the ranch about the first of May in '53?

A. Well, after checking the operation over we decided we would never get it planted the way it was going.

Q. And why was that?

A. There wasn't any management; there wasn't no question, it just seemed like it was sitting high and dry, the way it looked to me.

Q. Had very much been planted at the time?

A. There had been some planted there, yes.

(Deposition of A. G. Kirschmer.)

Q. Would you describe for us the planting that had been done?

A. He had what we considered in the neighborhood of 1,000 acres. It wasn't measured, but that was approximately what we thought he had planted, and as a result of that work that had been done we made up our mind we had to make a change.

Q. You mean that the work was unsatisfactory?

A. Yes.

Q. In what respect was it unsatisfactory?

A. It wasn't a good job of cultivating done ahead of seeding.

Q. What effect did that have on the seeding then?

A. Well, if there is no moisture, you can't get a drill in the ground; he didn't make any mulch ahead of his drill, and when I come on the place the first thing I noticed was a fellow harrowing. I asked the man what he was harrowing for. I said, "You never have to harrow ahead of the grain drill", and he said, "To cover the grain." I said, "Don't the drill cover it?" And he said, "No, the drill didn't cover it." He said that he didn't have the ground worked, and this man was harrowing to try to cover that up sufficiently so that if the rain come it would germinate. He couldn't get the drill in because he hadn't worked the land sufficiently ahead of the drill; it was too hard.

Q. Did you find that the seed then was not in the ground where it should have been, but was lying largely on top?

(Deposition of A. G. Kirschmer.)

A. Well, I suppose what I seen was lying mostly on top. In some places in the field the ground must have been a little softer; that wasn't true all over the field though, but I seen enough of it to know that the boy didn't do me no job. I am in the habit of doing a pretty good job of farming. I made money at farming and I made it because I did my work right, and that didn't suit me, that job; it just didn't suit me. I wasn't going to go along with that.

Q. Were there other things unsatisfactory about the condition of the ranch when you saw it the first of May of '53?

A. Yes, there was — from an operating standpoint it was pretty wet right at that time.

Q. You mean the ground was wet?

A. Yes, pretty wet, it hadn't dried up so they could do the right kind of work.

Q. What effect did that have upon the operation of the ranch?

A. Retarded the seeding dates.

Q. Was Mr. Hofues with you at that time, too?

A. Yes, he was out there at that time, too.

Q. As a result of the visit that you and Mr. Hofues made about the first of May of '53, was there any change made in the management?

A. Yes, sir.

Q. What was that change?

A. We made a lease to Clay Barr.

Q. Now, how did you happen to make a lease to Mr. Barr?

(Deposition of A. G. Kirschmer.)

A. Well, Mr. Hofues had accidentally run onto Mr. Barr and discussed the matter with him and we agreed that we would look into it, so we went up to Klamath Falls and Clay met us there and we went and looked the ranch over and looked the operation over.

Q. Had you known Mr. Barr prior to this time?

A. Just had met him, yes, met him a time or two.

Q. Had you had some business transactions with him prior to that time? A. No.

Q. And when you went to Klamath Falls then who all were present? Were you and Hofues and Clay Barr all there together? A. Yes.

Q. Did you go out onto the ranch together?

A. All people concerned were there, Bud Stevenson.

Q. What was the arrangement then that you made with Mr. Barr?

A. To go ahead and finish planting the crop as best he could.

Q. And what arrangement for compensation was made? A. Divide to rent.

Q. Divide the crop? A. Yes.

Q. Was there a written lease prepared between yourself and Mr. Barr? A. Yes.

Mr. Kester: I will ask the Reporter to mark as an exhibit for identification the photostatic copy of this instrument.

(Whereupon an instrument consisting of two pages was marked Defendants' Exhibit No. 1.)

(Deposition of A. G. Kirschmer.)

Q. I will show you the lease marked Exhibit 1 and ask you if that is a photostatic copy of the lease that was prepared covering Mr. Barr's operation of the Ranch, and does it bear the signatures of yourself and wife and Mr. Barr?

A. Yes, that is the lease.

Mr. Kester: Is there any objection made on the ground of it being a photostat rather than the original?

Mr. Tonkoff: No.

Mr. Kester: We will offer in evidence in connection with this deposition this Exhibit 1.

(The instrument marked "Defendants' Exhibit 1 is attached to this deposition and made a part hereof.)

Q. Now, in this lease it mentions that the ranch is subject to some other prior leases, Stevenson and Noakes and another one for potato raising; would you describe the situation on those, please, sir?

A. Well, we had reserved 250 acres of the better part of the land for some tenants that we leased the ground to for the purpose of growing potatoes.

Q. Now, could you state generally where those 250 acres lay?

A. I wouldn't know the legal description, but it was north of the house, immediately north of the house, along the road as you go to work.

Q. And was there a road extending generally north from the house? A. Yes.

Q. Sort of bisecting the farmed area?

A. Yes.

(Deposition of A. G. Kirschmer.)

Q. West of the levy? A. Yes.

Q. And did the potato land lie on one side or the other of that road?

A. Yes, it laid on the west side of the road.

Q. West side of the road? A. Yes.

Q. That would be the side away from the lake part? A. That is right.

Q. Now, there was reference made there to a prior lease to J. C. Stevenson; what land generally did Mr. Stevenson have?

A. He had a pasture, the grass lands.

Q. How did the grass land lie with respect to the lake bed?

A. Laid around the edges, near the mountain's edges. We called it the "fringe area."

Q. Would that be around say the southerly side of the lake bed principally?

A. Yes, and west too.

Q. South and west? A. Yes.

Q. There was reference there to some land leased to Mr. Noakes; where did that land lie?

A. It laid south and east of the headquarters.

Q. Are you able to say approximately how many acres Noakes had leased? A. 800.

Q. Can you say approximately how many acres Mr. Stevenson had leased in pasture lands?

A. I believe we had it figured eleven hundred acres, fringe area.

Mr. Tonkoff: You say Mr. Stevenson had eleven hundred acres?

A. That is about what we figured it in that

(Deposition of A. G. Kirschmer.)

fringe area, eleven hundred acres. Now, he had another privilege in the brush land which was away from this that he pastured some on.

Q. Where did the sagebrush land lie?

A. It laid north of the lake.

Q. North of the lake?

A. North and probably a little east of the lake, yes, North and east of the lake is where the brush land lay; it wasn't in use and there was some grass on it, so they used it.

Q. Do you have any idea approximately how many acres of brush land there was?

A. About two thousand.

Q. Now, in connection with this lease to the potato raiser, did he have any rights with respect to use of water from the ranch?

A. Yes, he had prior rights to the water.

Q. And did the pasture land have any rights with respect to the use of the water?

A. Yes.

Q. What was their rights?

A. Well, whatever the potato people didn't use, he could use; that was agreed. I think this contract covers that.

Q. And did anyone else have any priority in the use of water on the ranch?

A. Not on the main body of the ranch that I know of.

Q. Now, the prior rights that the potato raisers had and that Stevenson had to pasturage, did they

(Deposition of A. G. Kirschmer.)

pertain to some particular stream or body of water or to all of the water on the ranch?

A. Well, to all of the water. Of course, they preferred—they took preference of the pump water and the water from the mountain streams; they preferred that, of course.

Q. What was the condition of the water in the lake area east of the dam?

A. Well, the water in the lake was not considered fit for irrigation after mid-summer, or about mid-summer.

Q. Why was that?

A. It becomes too alkalied.

Q. Is that an area where alkali was a problem?

A. Yes.

Q. And for the record, what is the effect of alkali on the farming operation?

A. It stunts the crops, when you water, and wet the alkali, water that drains through alkali land, why it stunts it and it ceases to develop. It shrivels and shrinks it seems like in growth.

Q. And would you explain briefly why it is that after the middle of the summer the problem is worse than earlier?

A. Earlier when the water drains into the lake it is pretty much pure mountain water. Then, you have three months of evaporation and some withdrawal, you are getting down a little lower to the lake bed and that lake bed has got lots of alkali on it, so the water becomes polluted after it stands there that long with the alkali, the water that is

(Deposition of A. G. Kirschmer.)

always in the lake. In the spring the volume of water is so great that the percentage of alkali is not so effective.

Q. Now, did that alkali from the lake beside the levy, did that seep out and affect the surrounding land?

A. I think it drained, it seeped some, yes.

Q. Did you find, for example, that immediately west of the levy that there was alkali?

A. Yes, there was considerable area there that didn't grow nothing but salt grass.

Q. Was that because of the effect of the alkali?

A. Yes, that is right.

Q. I will ask you when did Mr. Barr take over the management of the ranch?

A. Well, our lease was signed May 7th when he got down to take over the operation of the crop.

Q. The 12th of May?

A. It was the 12th of May, yes.

Q. That is in 1953? A. Yes, sir.

Q. And did he then go into the operation of the ranch and take it over? A. Yes.

Q. Do you know if he had the occupation use of all the ranch buildings there?

A. No, he didn't have all of them.

Q. Why was that?

A. Well, our former employee wouldn't release them.

Q. You mean Bud Stevenson? A. Yes.

Q. What was the situation with respect to Bud

(Deposition of A. G. Kirschmer.)

Stevenson's arrangement with you after Clay Barr came into the picture?

A. The arrangement was this, that after I made the lease with Mr. Barr, I went to the ranch with Mr. Barr and introduced him to Bud Stevenson, which, of course, wasn't necessary, for the reason that we had made a deal with Clay and I explained to Bud that he would be an employee of Clay Barr's now, that we had leased the place and he should go on working just like the contract called for, but Clay would be his employer; and he agreed that he would do it.

Q. And did Bud Stevenson then stay on for the rest of the season? A. Yes.

Q. And did you continue to pay him under your original contract with him?

A. No, we paid him on whatever the agreement was. We had an agreement with Clay that he pay him part and we pay him part.

Q. And Bud Stevenson himself then stayed in possession of some of the buildings?

A. Yes, the main ranch house.

Q. Now, did you—how long did you stay on the ranch during May of '53? How long were you around? A. About a week.

Q. Long enough to help Clay get started?

A. No, I was gone when he got there to go to work.

Q. When was the next time you were back on the ranch? A. Early September, 1953.

Q. Now when you came there in September,

(Deposition of A. G. Kirschmer.)

what did you find with respect to the condition of the ranch and its operation?

A. I found them getting ready to harvest, but they were too early; the grains were too green to harvest.

Q. Could you describe generally what crops there were on the place?

A. Yes, there were barley and oats and a little rye, but it didn't produce nothing.

Q. Would you describe the condition of the crops insofar as the yield and the stand, beside being green, what was the condition?

A. There was some right good crops and some very poor crops.

Q. Generally speaking, where did the poor crops lie?

A. They lay closer to the lake on that near the house.

Q. Closer to the lake would be on the west side of the dam?

A. Yes, the west side of the road that would be used to kinda separate the farm lands there. It would be the west side of the land—it wouldn't be on the west side. The land—it would be on the east side. It was on the east side, in answering your question.

Q. The east side of the road, west side of the dam? A. Yes.

Q. In other words, between the road and the dam?

A. Yes, that is right.

(Deposition of A. G. Kirschmer.)

Q. Approximately how large an area was in that, if you could tell us without trying to be exact, just approximately?

A. I believe it was about seven hundred acres in that one tract, I don't believe it was ever all planted, but there was about that much land in that one tract, between the lake and the road.

Q. And what crops had been planted there in the area that was planted?

A. Oats, barley and rye, I believe.

Q. What was the condition of that crop when you saw it in September?

A. Pretty weedy and very thin.

Q. Aside from that area, what was the general condition of the crops on this ranch?

A. Well, after we went down a ways we seen very good crops, some very good crops, especially the fall plowing made a very good yield. It looked good, too.

Q. There was some area that had been fall plowed? A. Yes.

Q. Where did that land lie?

A. It laid either a mile and a half or two miles north of the ranch house, and then there was a canal that went cross ways there and it was north of the canal that this plowed land laid, and that is, of course, where this heavy crop was.

Q. Was that approximately about what you would call the middle of the field?

A. Yes, I would say about the middle of the ranch.

(Deposition of A. G. Kirschmer.)

Q. In that area it was pretty good?

A. Yes, very good.

Q. Was that in any way related to the fact that it had been plowed in the fall?

A. I think to a great extent. They had plenty of loose ground to get a good mulch for the seedling in.

Q. The area where the crop was poor, would you know if that had been plowed in the fall?

A. No, sir, it hadn't.

Q. Was that the same area where you had observed the harrowing to cover up the seed?

A. Yes.

Q. Aside from the area that you have already described, were there any other areas where the crops were either particularly good or particularly poor?

A. I know some other areas where it was particularly poor.

Q. Where were they?

A. Around the fringe areas and a little farther north where I think they become affected with alkali again.

Q. Now, the fringe areas would be on the what side of the ranch generally?

A. It would be on the west and northwest, west and northwest.

Q. Is that a part of what you would call the original lake bed, or is that up on the side of the hill?

A. It kinda branches away from it, just kinda

(Deposition of A. G. Kirschmer.)

starts sloping a little bit, that is the fringe area where it starts to slope up the mountains.

Q. Is that soil the same character as the soil in the lake bed itself? A. No, sir.

Q. What kind of soil do you find up on the slope of the hills?

A. Hard gumbo, tough gumbo. When it is wet, it is tough, and when it is dry, it is hard.

Q. Now, is that land generally suitable for raising that kind of crops using the special treatments?

A. It should have special treatment.

Q. What kind of treatment does it need?

A. Chemical treatment.

Q. Had anything like that been done before Clay Barr came in? A. No, sir.

Q. Is that area on the side hill there suitable for irrigation?

A. When properly prepared, yes.

Q. What type of preparations would it need?

A. It should have had some leveling done, terracing and leveling.

Q. In order to permit it to be used?

A. Well, in order to handle the water; as it was, it was pretty hard to put just all over; you could get it some places.

Q. Was it possible to do that leveling after Clay Barr came in?

A. No, it was too late then. It was not a tenant's job anyway. It is too big a job for a tenant.

Q. In other words, the land in its then condi-

(Deposition of A. G. Kirschmer.)

tion was just handicapped by that character of irrigation?

A. The best you could do was just haphazard irrigation, hit here and miss there.

Q. Now, what was the situation of the ranch with respect to the potential irrigation for grain crops when you went in as purchaser? What did you contemplate in the way of irrigation, if any?

A. We never contemplated that. We never took into consideration any irrigation.

Q. In other words, you didn't plan that there would be any irrigation?

A. Well, Mr. Stevenson told us that they never irrigated to speak of. Once in a while they would sprinkle a little; they had a sprinkler there. He had a sprinkler there, but he said it wasn't necessary to irrigate.

Q. Did you discuss with Mr. Stevenson, the prior owner of the place, in respect to the proper way to get the best yields out of the ranch?

A. Yes, I did.

Q. And did you follow the advice he gave on it?

A. To a certain extent we did, maybe not 100%. We listened some to Bud and some to Jim.

Q. What did you find with respect to whether Jim or Bud had the best advice with respect to the operation of the Ranch?

A. We found Jim had the best judgment. His information was more reliable, as it proved out.

Q. How long had Jim Stevenson operated the ranch before you became interested in it?

(Deposition of A. G. Kirschmer.)

A. Eight years.

Q. And did you make a study of the situation to determine whether or not irrigation was proper or feasible?

A. Oh, I just never thought about it. We had so much land that didn't need irrigation we never thought about the irrigation part, just never took that into consideration.

Q. What part did not need irrigation?

A. All of the peet land. That was the low laying land that was considered the lake bed, which comprised twenty some hundred acres which didn't need irrigation that was plenty wet all summer, and that is the word I got from Jim Stevenson and Bud admitted that.

Q. Was that confirmed by your own observation?

A. Yes, there are enough moisture in the subsoil after the water was pumped off in the spring. It had saturated it so well that it would make a crop without any further irrigation.

Q. Now, insofar as the fringe areas were concerned up above the old lake bed, I believe you said that you didn't contemplate any irrigation on that.

A. I never thought about it at the time. If I had been operating it, I might have changed my mind. I just never got quite into the operation where I was with it all of the time, just never had a chance to study it that closely.

Q. Now, when you came there in September, did

(Deposition of A. G. Kirschmer.)

you stay on while the crop was being harvested or did you come back again, or what?

A. We come back and I went back again then, after the crop was about two-thirds harvested.

Q. Were you there while the harvesting operation was going on?

A. Yes, the last of it.

Q. What did you observe with respect to the way the harvesting operation was conducted?

A. Well, as I said, I didn't see it all, but what I seen, it seemed to be going along with a fair degree of efficiency.

Q. Did you have any criticism of the harvesting operation?

A. I didn't make any criticism.

Q. Did you observe whether or not there was any excessive waste of grain in the harvesting?

A. I didn't observe it. If there was, I didn't observe it.

Q. Did you observe whether or not there was any waste of grain in the hauling from the farm to the handling point?

A. Just one spot.

Q. Where was that?

A. Somebody dumped a part of a load on the road.

Q. Do you know how that happened?

A. They told me the end gate came open.

Q. Aside from that accident, did you observe any wastage?

A. Oh, there was a little grain on the road, but any road you haul grain over you are going to see

(Deposition of A. G. Kirschmer.)

grain on the road now and then. I think I seen that much, but it wasn't what we call waste.

Q. Did you as an owner of the ranch have any criticism of the way that Clay Barr managed the ranch, either from the standpoint of growing or harvesting the crop?

A. No, I wasn't there all summer, you know, and I didn't see how it was done, but I didn't bring about any criticism from what I observed.

Mr. Tonkoff: What was the last you said?

A. I said I didn't offer any criticism from what I observed. I wasn't there all summer, you know.

Q. Did you have any dissatisfaction with the quantity or quality of the crop that was produced?

A. Yes, I did.

Q. What was that based upon?

A. Based upon fair return for land like that.

Q. Well, was that dissatisfaction directed in any way toward Clay Barr's operation of the ranch?

A. I didn't think so at the time, and I don't think so yet, not entirely; there might have been some improvements made, but it wasn't the primary thing that stood in the way.

Q. What was the primary difficulty?

A. The primary difficulty was—as I see it, the primary difficulty started with the poor job of seeding the first one thousand acres, and secondly, three weeks of cold wet weather. After that sprouted it just laid there and the weeds grew and the grain didn't grow. That is as I see it. And the wheat and the barley and the rye and the oats seemingly got in

(Deposition of A. G. Kirschmer.)

a weakened condition, and too there was some alkali in that grain; after the ground stood cold so long and wet so long the alkali came out, and I believe that was the primary reason why that seven hundred acre field didn't do no good, because the grain had come up pretty good at one time, but not too good, but it come up to a fair stand; and then when fall come there wasn't no grain there; it just dried out, that is what I am going by.

Q. You feel that it was the excessive dampness and alkali?

A. A cold, damp spring let the alkali do too much work before the grain got to going.

Q. From your experience in raising grain crops, could you tell us what could be done from the standpoint of spraying grain crops to keep down weeds?

A. That in some cases is very effective.

Q. In what situations will it work?

A. It works on some weeds; it doesn't affect all weeds so much, but some weeds die very readily from spraying; others it takes heavier charges.

Q. Do you know whether the weeds on this ranch, particularly with reference to that seven hundred acre tract you spoke of, whether those weeds would have been susceptible to spraying?

A. I don't remember ever spraying that kind of weed, but they looked like tough weeds to me; they are a legume weed; they are a tough legume, very fibrous weed and I don't know how much of a charge it would have taken to kill them, I am sure pretty strong.

(Deposition of A. G. Kirschmer.)

Q. If you had put a strong enough spray on to have killed those weeds, what would have been the effect on the growing grain crops?

A. I don't know the effect on the grain, but it is my opinion that it would have damaged it some too, if strong enough to have killed that crop of weeds that was on there.

Q. Was the grain crop itself in a weakened condition as a result of the dampness and the alkali?

A. That was the beginning of it. The weed, of course, as he was more rugged, he grew. I am assuming that is the way it turned out, I wasn't there after the last wheat had come up with it, and that is the information I got when I got there. They said that the weeds kept growing and the grain stood dormant in that cold spring.

Q. From your experience in spraying grain fields, if the weeds were strong and the grain was weak and you would put on a powerful enough spray to get the weeds, would it have damaged the grain crops?

A. Yes, it does; I have had it happen to me.

Q. Were you present in the vicinity of the ranch at the time the harvest was finished? A. Yes, sir.

Q. Were you around there as it was finished up? A. Yes, sir.

Q. Do you know what arrangements were made with respect to the sale or other disposition of the crops?

A. Now, when we got there the crop had been contracted.

(Deposition of A. G. Kirschmer.)

Q. To whom? A. Kerr-Giffard.

Q. And who had made the contract?

A. Bud Stevenson had made the agreement; as the information come to me, Hofues gave him the authority to sign the sales contract for a given amount, which I believe was \$3.00 a hundred, or \$3.10, something like that, and that contract was being performed when I got there, because most of the grain had been harvested. I was there the first of October and they were taking it to Kerr-Giffard then.

Q. So far as you and Mr. Hofues were concerned, Was Bud Stevenson authorized to make the deal with Kerr-Giffard?

A. Well, I don't think, in the contract, I don't think we plain gave him the authority to contract our grain; he was to contact us, and I think Hofues was the one that gave the authority to sell at that figure.

Q. Was that satisfactory to you?

A. Yes, that is as good as we could do; it was satisfactory.

Q. So, as far as you and Mr. Hofues were concerned the transaction where grain was sold to Giffard was satisfactory, was it?

A. Yes.

Q. Are there storage facilities for grain in the immediate vicinity of the ranch there?

A. No.

Q. How was the crop handled once the harvesting was done with it?

(Deposition of A. G. Kirschmer.)

A. Well, the ranch had a loading-out facility at Macdoel, and that is what we used to load it out.

Q. On rail cars? A. Yes.

Q. In other words, it was hauled directly from the ranch to cars?

A. Yes, to the little loading-out elevator we had there, to the little loading-out elevator and then it was put into cars.

Q. Was there any place anybody could have stored that quantity of grain?

A. No—there was, but they had their own grain; they were full.

Q. So that the loading on rail cars for immediate shipment was the only way you could dispose of it? A. That was the only way out.

Q. Do you know who made the arrangements for the sale to Kerr-Giffard of the interest besides that of yourself and Mr. Hofues?

A. I don't think I know just who made that contract.

Q. Now, after the harvest was completed, did you receive an assignment from Mr. Barr of the sum of \$15,000. out of the proceeds of the crop?

A. Yes.

(Whereupon an instrument was marked Defendants Exhibit No. 2)

Q. I show you a document marked Exhibit No. 2 and ask you if that is the original assignment from Clay Barr to yourself for the sum of \$15,000?

A. Yes, that is it.

Mr. Kester: We will offer in evidence, De-

(Deposition of A. G. Kirschmer.)
fendants Exhibit No. 2, and ask leave to substitute copies so that the original can be returned.

Mr. Tonkoff: That is all right.

Mr. Kester: I will now return the original to you and a copy will remain in lieu of it.

(Defendants Exhibit No. 2 is attached hereto and made a part of this deposition.)

Q. Have you had a transaction with Clay Barr involving the purchase by him of a grain elevator in Colorado?

A. Well, it wasn't my deal; he purchased it from Hofues.

Q. And then where did you come into it?

A. I bought the note.

Q. From Hofues? A. Yes, from Hofues.

Q. And this reference in the assignment to an obligation that Mr. Barr owed you, was that the result of that transaction?

A. Yes, sir, it was.

Q. At the time that that assignment was made, did Mr. Barr owe you \$15,000. on that transaction?

A. Yes, he owed more than that, but it wasn't due; it was due shortly after that.

Q. But there was a particular payment of \$15,000. that was due? A. Yes.

Q. And was this assignment made to apply on that payment? A. Yes, sir.

Q. Now, after the crop was in and sold for 1953, what was done with the operation of the ranch then? Did Mr. Barr continue in the operation?

(Deposition of A. G. Kirschmer.)

A. Yes, he was in charge of it then until the completion of harvest.

Q. And after the completion of harvest, then what occurred?

A. It was transferred to the Farnham Bros. then.

Q. F-a-r-n-h-a-m? A. Yes.

Q. How was that transfer completed?

A. Clay Barr made an assignment of his lease to the Farnham Bros.

Q. Farnham Bros?

A. *Barnham* Bros, yes. It is F-a-r-n-h-a-m, I think is how they spell it.

Mr. Tonkoff: It is "F-a-r-n-a-m".

The Witness: There is no "h" in it?

Mr. Tonkoff: There is no "H" in it.

Q. Then did the Farnam Bros, enter into any deal with you and Mr. Hofues? A. Yes.

Q. Now, the Farnam Bros. are still on the place?

A. Yes.

Q. And are they now engaged in the purchase of the ranch from you and Mr. Hofues?

A. That is what they are working on, yes.

Q. From your standpoint as an owner of the ranch and having an interest in the crop, is there anything wrong with the operation of Mr. Barr in managing the ranch for that year?

A. Yes, it wasn't his fault; he got there too late. If he would have started March 1st, I would have been critical on the operation, but being as

(Deposition of A. G. Kirschmer.)

he started as late as he did, I am not critical.

Q. Did you feel that he did the best that he could under the circumstances?

A. Under the circumstances, getting started late and wet weather hitting him, there was just nothing anybody could do.

Cross Examination

Q. (By Mr. Tonkoff): Mr. Hofues' full name is Frank Hufues?

A. I think it is Frank S. Hofues.

Q. How do you spell Hofues?

A. H-o-f-u-e-s.

Q. How long have you been acquainted with Mr. Hofues? A. About August, 1951.

Q. And prior to that time had you had any business with Mr. Hofues?

A. No, never met him.

Q. And when was the first business enterprise that you and he entered into?

A. That was in the latter part of August, 1951, I sold him my Corporation assets I had there at Burlington.

Q. Burlington what? A. Colorado.

Q. What was the nature of those assets, Mr. Kirschmer? A. My grain elevator and land.

Q. Is that the grain elevator that you purchased the note?

A. That is right.

Q. And then what did he do? Did he resell that elevator? A. He resold it.

(Deposition of A. G. Kirschmer.)

Q. What was the purchase price of the elevator or the assets from you?

A. A half million dollars.

Q. And was that paid for in cash?

A. Cash and trade.

Q. So that the grain elevator was paid up?

A. Yes.

Q. In other words——

A. He got a clear title to it.

Q. Mr. Hofues never owed you anything after August, 1951?

A. Well, he owed me some money, but not in that respect. He owed me some notes that he gave me that he didn't get paid at that time.

Q. Then he resold the elevator? A. Yes.

Q. Now, then, he resold the elevator?

A. Yes.

Q. And when did he resell it, Mr. Kirschmer?

A. I couldn't tell you the dates.

Q. What year? A. 1952.

Q. And do you remember what month?

A. It must have been early in the year, because there was a note signed there about February that as I remember it, the note I have was made first to Hofues and the Denver National Bank, and that is where I bought it.

Q. The note was made to whom?

A. Hofues, and he had it at the Denver National Bank.

Q. Who executed that note?

A. Clay Barr.

(Deposition of A. G. Kirschmer.)

Q. How much was the——

A. Betty Barr, I believe, Clay and Betty Barr.

Q. How much was the sale of that elevator?

A. That I didn't know. It was part cash and part trade consideration, so I don't know what they figured that they got out of it.

Q. How was this \$1000,000. note payable?

A. \$7500. a year and interest.

Q. And when did you get an assignment of this note?

A. I believe it was along March or April of 1952.

Q. Was anything due on the note at that time?

A. No.

Q. Well, in other words, when you took the assignment of the note, there was nothing, nothing——

A. Nothing due.

Q. Nothing due? When the first payment to be made?

A. As I remember, the first day of February.

Q. Of 1953? A. Yes.

Q. And was that made? A. Yes.

Q. And how much was the payment?

A. It runned \$12,500, I think is what it amounted to, as I remember it.

Q. How much interest does this note bear?

A. Five percent.

Q. And what portion of the note had been paid, was paid—in other words, what was the balance of the note? A. \$100,000.

(Deposition of A. G. Kirschmer.)

Q. And the first payment was made in March of when?

A. Oh, it was made I think in either January or February, 1953.

Q. The first payment on the note?

A. Yes.

Q. And was that paid? A. Yes.

Q. So that, is the note up to date up to now?

A. Yes.

Q. So Mr. Barr owes you nothing.

A. Nothing due now.

Q. Nothing due? A. No.

Q. I see. Now, at the time that you went over to the ranch in 1953—was that 1953? Yes, 1953, did Mr. Barr tell you that his share of the crop had been assigned to J. P. Tonkoff—

A. Yes, he did.

Q. When did he tell you that?

A. Oh, I don't remember. I just remember knowing about it, that is all. He told me about it there in the operation; he was around there when the harvest was going on when I got there.

Q. He told you that his share of the crop had been assigned to J. P. Tonkoff and Horton Herman? A. And Welch came in.

Q. E. J. Welch? A. Yes.

Q. Did he tell you of any others?

A. No, he didn't mention but two—he might have mentioned others, but that is all I can remember.

(Deposition of A. G. Kirschmer.)

Q. And did you look up to see whether that was recorded in Siskiyou County?

A. No, I didn't.

Q. When did he tell you of the assignment of the crop to myself and Mr. Horton Herman?

A. Oh, as I remember it, is was in the hotel when we got back. I believe he told us about it when we were first out there and he wanted to harvest in early September.

Q. So in September you knew that he didn't own that crop, his share of the crop?

A. Well, I knew that he owned an expense portion, he told me, he was entitled to certain portions of the crop and other than that, he made his assignment; that was the information he gave me.

Q. Did you look over the assignment as it was recorded? A. No, I didn't.

Q. Well, this payment that he assigned of \$15,000. was for the payment of the 1953 interest?

A. Yes, 1950—of course, the note is so drawn that he can pay any amount at any time.

Q. And he did make that payment that he owed you in 1953? A. Yes.

Q. When, in January of 1954?

A. When it was due; I think it was January or the first of February. It was the latter part of January or the first of February, around there somewhere, anyway it come.

Q. Has he made you the 1954 payment on that note? A. Yes.

(Deposition of A. G. Kirschmer.)

Q. So at the present time you have nothing coming on the note from the \$15,000. in Oregon?

A. Nothing due.

Q. Well, now, when did you and Mr. Hofues purchase this ranch?

A. Well, you might say when did Mr. Hofues purchase it; he was the one that purchased first; I came in later.

Q. Yes.

A. It must have been in early August.

Q. What was the purchase price, Mr. Kirschmer?

A. A little over \$1,000,000, I just don't know exactly, but it was probably a million and \$75,000, I believe.

Q. And you bought in a half interest as I understand, a little later on?

A. That is right.

Q. So did you and Mr. Hofues have equal say about the operation of the ranch?

A. Yes.

Q. Now, you say Bud Stevenson had planted about 1,000 acres of grain when you went to see it in May.

A. That is right.

Q. He was planting it then?

A. Yes, when he could get in the field he was planting.

Q. When did you again go to the ranch?

A. In September.

Q. You hadn't been there during the summer?

A. No, I hadn't never been there during the summer.

(Deposition of A. G. Kirschmer.)

Q. Well, you spoke on Direct Examination concerning the wet weather that they had in that vicinity in 1953; did you learn that by——

A. I called, I kept in touch with them by telephone and they told me it was very wet there.

Q. Who told you that?

A. I talked to Bud, and I talked to Clay; talked to everybody that was concerned who I could get information from, and I was quite disappointed. I know when I talked the crops should have all been planted. They were still waiting on weather that they could work in.

Q. Did you know of the condition of the crop in June of 1953?

A. No, I wasn't there.

Q. How many acres was Mr. Barr supposed to plant?

A. Well, all the land that he could possibly get in, all that he could possibly get in.

Q. Well, how many acres was that?

A. That around 2,000 acres, close; I think about 2500 acres, gross amount, including that that had been planted.

Q. It was closer to 3,000 acres altogether wasn't it, Mr. Kirschmer?

A. Well, no, the rest of it was in no shape to get in crops. It was too much work required to get it in shape for a crop.

Q. Now, what was he supposed to plant?

A. He was supposed to plant barley and oats, primarily, growing barley.

(Deposition of A. G. Kirschmer.)

Q. And wheat, wasn't he?

A. I don't think we mentioned wheat. We might have, but I don't remember that we mentioned wheat.

Q. Had you farmed in any country near Oregon, there in Oregon? A. Me?

Q. Prior to this time, Mr. Kirschmer?

A. No, I hadn't.

Q. Now, how many acres did he plant, do you know.

A. No, I don't know; there was part of it tore up after it was planted. It got weedy, so weedy that there was no way to harvest it.

Q. Well, did you know that he had plowed up some of it? A. Yes.

Q. Did you ever give your consent for it to be plowed up?

A. I don't remember that I was ever contacted on it.

Q. Well, now, in that country—are you familiar with the farming operation in that country, Mr. Kirschmer?

A. Not too good. I don't know too much about it, any more than what I have learned right there.

Q. Now, how many acres did you have planted the year before?

A. Well, Stevenson, he didn't have it all in either. I don't know, but probably 2,000 acres.

Q. And you got what—what returns did you get the year before, the gross amount?

A. Oh, it didn't run much more, just a little more.

(Deposition of A. G. Kirschmer.)

Q. A little more? A. Yes.

Q. How much more?

A. Well, I wouldn't swear to this, but I judge about \$10,000. more or maybe \$15,000. more; I believe that was about it. I know we were disappointed in the outcome.

Q. It brought in \$100,000. the year before?

A. Yes, a little over \$100,000.

Q. Over \$100,000? A. Yes.

Q. Do you remember about how much over \$100,000, Mr. Kirschmer?

A. \$110,000, I think, as well as I remember.

Q. And where was the crops sold to?

A. It was sold to Kerr-Giffard, too.

Q. It was sold to Kerr-Giffard, too?

A. Yes.

Q. Now, right now you have no interest in that \$15,000. that has been assigned to you in Oregon, have you? A. No.

Q. Now, did you see—when grain gets dry you must irrigate it or you are going to lose it, if you haven't got water available, wouldn't you?

A. Yes, if you have an irrigated farm you should irrigate it.

Q. Now, did you notice the crops out in the fields between the big drain ditches that are on that ranch? A. Yes.

Q. Did you notice the crop there?

A. Yes.

Q. They were not over knee-high, were they?

A. Well, what part of the place did you mean?

(Deposition of A. G. Kirschmer.)

Q. Well, most any place on the ranch where the crops were growing between these grain ditches that go through the fields?

A. Oh, I don't know. I seen a lot of grain got this high.

Q. When you say this high, you say about what, four feet?

A. Three feet.

Q. Three feet?

A. A lot of that grain got, must have got about three feet high.

Q. That is right, and the only place it got three feet high was around where it was damp, where it had the irrigation water, didn't it?

A. No, there was no irrigation; it was just simply in the lake bed, that don't require irrigation.

Q. Well, did you notice any of the ground, how it was cracked? A. Yes.

Q. That is lack of irrigation, isn't it?

A. No, nobody ever irrigated that place. That hasn't been the practice there at all. Mr. Stevenson told us that and he told us more than that, if you irrigated too much lake you are going to have frost take your crop.

Q. Well, but the reason that ground was cracked was because it wasn't irrigated, isn't that right?

A. It probably would have helped it if it had been irrigated, probably would.

Q. And the reason some of that grain wasn't

(Deposition of A. G. Kirschmer.)

more than knee-high was because it didn't receive the proper amount of moisture, isn't that correct, Mr. Kirschmer?

A. More moisture would have probably helped it, that is right.

Q. Twenty-eight hundred acres in that vicinity should have brought a quarter of a million dollars for that crop, shouldn't it?

A. Yes, we figured it should.

Q. And that is why you employed Mr. Barr to plant it then to get that kind of a crop?

A. I just wanted to get something planted. When we employed Mr. Barr; it looked like we weren't going to get it planted.

Q. Mr. Barr agreed to do that, didn't he?

A. Yes, sir.

Q. And he agreed to farm that property in a farmer-like manner, did he not, with you?

A. I thought he done about as well as anybody would considering circumstances. No, it wasn't farmed right good, but taking circumstances into consideration, naturally he couldn't.

Q. Well, a good farmer-like manner would mean spraying for grass when you found the weeds coming up through the grain, wouldn't you?

A. Yes.

Q. He didn't do that, did he? A. No.

Q. What? A. No.

Q. Well, now, the crop in 1953 brought a little over \$88,000, isn't that right? What was that?

A. I think that is somewhere near right.

(Deposition of A. G. Kirschmer.)

Q. Well, approximately; I am not asking to pin you down exact on it, because I have forgotten. And your share was released by myself so that you got your share of that crop? A. Yes.

Q. So the only proceeds that Kerr-Giffard has up there now, you have no interest in it?

A. No interest that I know of.

Q. Kerr-Giffard has paid them into courts since then? A. Yes.

Q. And you have no interest in that law suit up there whatsoever? A. No.

Q. You don't contemplate of ever making any claim against Kerr-Giffard for that money, do you, for the \$15,000?

A. No, I don't think I would.

Q. And you don't contemplate making any claim against these \$44,000. that is paid into court, do you? A. No, sir.

Q. Now, you say that you consulted with Bud Stevenson. A. Yes.

Q. Concerning the farming operation?

A. Yes.

Q. Was there any dissension between Mr. Barr and Mr. Stevenson?

A. Well, I wasn't around there all summer. I didn't know, but I heard there was.

Q. Where did you hear it from?

A. Oh, I guess pretty much everybody that talked about that operation; heard it from some of the boys that Clay had there on the place.

(Deposition of A. G. Kirschmer.)

Q. Did Mr. Stevenson ever tell you that the place should be irrigated?

Mr. Kester: Which Stevenson?

Mr. Tonkoff: Bud Stevenson I mean, the manager.

A. Yes, Bud told me that he thought it ought to be irrigated.

Q. And he also told you he didn't have the funds with which to hire help to irrigate and run the potato crop, too, didn't he?

A. Well, no, he didn't tell me that.

Q. When did he tell you that the property should have been irrigated?

A. I think it was in July.

Q. And at that time, didn't he tell you that myself and Mr. Barr and Mr. Welch had been down there?

A. I don't think he told me that then; I believe he told me later, when I got out there, I think he said that you should have been out there.

Q. And at that time did he tell you that Mr. Barr had promised to come down in a day or two and start the irrigation?

A. No, he didn't. He said that—he called me and told me that it should be irrigated. I said, "Well, I will call Clay," and I did.

Q. And about what time of the year was that?

A. Oh, I judge it was somewhere in the middle of July.

Q. And at that time it still hadn't been irrigated, had it? A. No.

(Deposition of A. G. Kirschmer.)

Q. Did you know that prior to that time, about approximately two weeks, that Mr. Barr and myself and Mr. Welch had been on the property?

A. No, I didn't know that. I might have heard it, but I just don't remember having heard it.

Q. Well, now, there was no irrigation done on the property except the small area there where Mr. Bud Stevenson did, is that right?

A. I think that is right.

Q. And that portion of the crop was the best of the whole field, wasn't it?

A. I don't even remember seeing that portion; it could have been, but I don't think they pointed that out to me.

Q. You didn't see the crop in June, did you?

A. No, I did not.

Q. Did you get any report concerning the crop in June? A. No.

Q. Did you know that in June the crop was in good shape up to the 10th or the 12th of June?

A. Well, I never heard anything from anybody in June. I got some reports in July and they said that the crops looked very good, but there was some ground, Bud said that there was some ground that needed irrigating.

Q. You have no idea how much ground was seeded, do you, Mr. Kirschmer?

A. No, I just couldn't tell you that.

Q. Did Mr. Barr—let's see, this lease provides for—who was to pay for the seed?

A. Mr. Barr.

(Deposition of A. G. Kirschmer.)

Q. And this lease says that he was to pay you for all seed that had been planted prior to that time? A. Yes.

Q. How much seed did he use, do you know?

A. No, I don't have a record of that.

Q. Did Mr. Barr do a good job of seeding?

A. Yes, I think he did. It looked like it was good work; after I got out there I could see the stuff he planted come up in rows; he had rowed it.

Q. When did you see that?

A. In the Fall.

Q. Was that some that was three feet high?

A. Yes, all heights; there was some of it that was down here.

Q. For the record, how high would you say that was, about knee-high?

A. Eighteen inches.

Q. What?

A. Eighteen inches, the shortest.

Q. You didn't see the crop then—so there won't be any mistake about it—I think you said until it was ready for harvest.

A. Yes, that is right. I went out, assuming the harvest was ready early in September and I found I was a month early.

Q. Did you have any frost in 1952?

A. Yes, light frost.

Q. Did it take any of the crop?

A. No, it might have done a little damage, but not noticeable.

(Deposition of A. G. Kirschmer.)

Q. Did you see them harvesting the crop in 1952? A. Yes.

Q. Had a pretty good stand at that time, did you not? A. Yes.

Q. You didn't see any grain that was eighteen inches in height, did you?

A. No. I don't think I did. I guess we did too, I will take that back. The fringe area, the gumbo was no good then, the same as now.

Q. Well, you sprayed it in 1952, didn't you?

A. I don't think so.

Q. For weeds?

A. We didn't, because we didn't have it that early. I don't think Stevenson did, because he didn't get it planted until June.

Q. The 1953 growing season was excellent, though, wasn't it?

A. After it dried up I think it was, yes.

Q. There wasn't any frost? A. No, sir.

Q. I was particularly referring to frost.

A. No.

Q. Is Bud Stevenson employed by you now?

A. No.

Q. He lives in Klamath, does he not?

A. I think he does now.

Q. Does Jim Stevenson live in Klamath?

A. Yes.

Q. Have you seen him of late?

A. No, I haven't seen Jim for over a year. I haven't seen Bud. I expect it has been a year since I have seen Bud.

(Deposition of A. G. Kirschmer.)

Q. Now, when you talk about giving authority to Bud Stevenson to sell the crop, what time of the year was that?

A. I doubt that I was the one that gave that authority.

Q. Well, when he was given authority?

A. It must have been about harvest. Hofues gave him authority to contract with Kerr-Giffard, because Kerr-Giffard wanted somebody that had authority to sign the contract.

Q. And at that time you knew, of course, that Mr. Barr's share had been assigned to myself and Mr. Horton Harmon?

A. I think Mr. Hofues knew it.

Q. Well, you knew it, didn't you?

A. I knew it.

Q. When you gave that authority, of course, that authority only pertained to your share of the crop? A. That is right.

Q. You weren't contracting for Mr. Barr?

A. No.

Q. Do you know who sold Mr. Barr's share of the crop? A. No, I don't.

Q. Do you have any idea, Mr. Kirschmer, how many acres were planted both including that area planted by Bud Stevenson and Mr. Barr?

A. Actually I am not quite that familiar with those different fields, unless I would just sit down and figure them up from a chart. I just don't know those fields that well. You see I have never been there except just visiting the place, never had anything to do with the operation.

(Deposition of A. G. Kirschmer.)

Q. What was the largest yield per acre that you have gotten there?

A. I think as good a yield as we ever got, Clay got off of that Fall plowing.

Q. Well, how much was that?

A. I believe it run up to 3500 pounds per acre, something around that.

Q. Mr. Kirschmer, I don't know much about wheat. How many bushels would that be?

A. Forty-eight pounds to the bushel, so that would make about just half that many bushels you see; it would be twice that many bushels, about seventy bushels to the acre.

Q. How much of the property produced that?

A. I judge about 650 acres.

Q. That was where the wheat was about four feet high? A. The barley.

Q. The barley?

A. The barley was tall. It was the best part of the ranch.

Q. And if the whole ranch had been properly plowed, the Fall before, it would have produced about seventy bushels to the acre?

A. Well, it wasn't all that good.

Q. Well, how much would it average?

A. I think we would have had an average of fifty bushels to the acre. I believe we had. All of this alkali land would have produced more than it did, we know, because the alkali goes down when you plow it. When you put water on plowed land

(Deposition of A. G. Kirschmer.)

it seeps the alkali down when you plow it; but when you don't plow it, it stays on top.

Q. You say an average of fifty bushels to the acre, that would be——

A. That would be 2500 lbs., and they sell that per hundred.

Q. It would be about, 2500 acres would be, how much did we say, fifty bushels to the acre?

A. Fifty bushels to the acre, on 2500 acres, it would be 125,000 bushels.

Q. And what was the average price of grain then? Do you off-hand remember?

A. Well, the 1952 crop sold for \$4.10 a hundred and the 1953 crop sold for \$3.00 a hundred.

Q. That would have been around \$300,000, wouldn't it? A. Yes.

Q. That is what you expected to get?

A. We knew it could produce that.

Q. Well then, there was something wrong, either with the planting or the farming or harvesting or something was wrong around there, wasn't it, Mr. Kirschmer? A. Yes, sir, there was.

Q. Did Mr. Barr replant that area that was planted by Bud Stevenson?

A. No, it was too late.

Q. Well now, you said some of that land should have been leveled; was that land that you were speaking of that should have been leveled?

A. This land that they talked of irrigating isn't land that you can—it wasn't prepared for irrigation. Stevenson never irrigated it and it never was

(Deposition of A. G. Kirschmer.)

prepared for proper irrigation. You could irrigate it, but you know water, how water is, it runs around here and there and everywhere; you could have probably helped it some by irrigating, but you wouldn't have ever got a job. In order to get a job irrigating, you have got to put a float on that land and float it and prepare it so that when you put water on it it will spread, and that wasn't done; there was no time for it.

Q. You say Mr. Jim Stevenson did tell you it was necessary to irrigate?

A. Bud Stevenson.

Q. Oh, Bud, it wasn't Jim? A. Yes, sir.

Q. Mr. Kirschmer, does Mr. Hofues know any more, has he ever told you anything more than you have testified here? Does he know any more about this situation than you have testified to?

A. No.

Q. About the same?

A. He would know less about it. Let him read it and see if that suits him. I think I know more about it than he does.

Q. Well, we will consider that later.

A. Unless he has heard some conversation that I didn't know anything about.

Q. Now, at the time you arrived there in September, did you say you arrived there in September when the harvest was part way over?

A. We arrived there in early September when it was too early for harvest.

Q. Oh, pardon me.

(Deposition of A. G. Kirschmer.)

A. They had phoned us that harvest would start around between the first and the tenth, so we were going to be there in time. We waited around there two or three or four days, I think about the fifth, and then we seen it was still two or three weeks off and then went back home.

Q. Then when did you return, Mr. Kirschmer?

A. About the first of October.

Q. And at that time, how much of the area had been harvested?

A. They had been harvesting about ten days I guess, and they must of had two-thirds of it harvested.

Q. They had two-thirds of the——

A. Yes, all of two-thirds. I tell you, they had two-thirds of the acreage harvested and eighty percent of the grain or eighty-five.

Q. They had harvested the portion that Mr. Barr had planted? A. Yes.

Q. Is that what you mean?

A. That is right.

Q. What was that to be harvested?

A. When I got there they were harvesting on this tract that was discussed here earlier where I said I saw that fellow trying to harrow in the grain right after they drilled. That was close to the house. You see that was on the right hand side of the house as you go north, immediately after the pasture, and that is where they were harvesting when I got there.

Q. Now, looking north from the house and to the right was the patch of rye, wasn't it?

(Deposition of A. G. Kirschmer.)

A. Yes, rye, barley and oats. There were three different varieties of feeds planted there.

Q. What acreage would you say those weeds covered? Would you estimate it at 400 acres?

A. Yes, I presume they were weeds, and there were spots in there that wasn't weedy; there was a little grain there, but it covered about 400 acres of the little weedy patch, maybe a little less than that, because there was some plowing done.

Q. Was any portion of the area that was weedy harvested? A. Yes.

Q. Did it bring any——

A. They got a little off of it, I don't remember, it didn't amount to much. It was low grade. They had to take discounts on it.

Q. How much would you say, how many bushels per acre would you say you got there?

A. Oh, seven or eight bushels.

Q. Had those weeds not been there you would have got about an average of fifty, would you say?

A. No, not fifty.

Q. How much would you have gotten?

A. There wasn't no stand there. You see the grain died.

Q. But I say, had there been no weeds there?

A. If there had been no weeds there, I would have said sixteen bushels to the acre, probably, with that kind of a stand that was there.

Q. Well, you didn't see it when it was early before the weeds came up.

A. I seen it in the Spring. I was there, I seen

(Deposition of A. G. Kirschmer.)

it was coming up pretty fair in spots, but you see they didn't get it in the ground well enough to get a good stand, but it had a fair stand and it would have made some grain, it looked like when I come, but when Fall come and I got out there, I couldn't see nothing in a lot of places; there was nothing left there in places, and I am assuming the alkali killed it.

Q. Well, the weeds would have had something to do with it, wouldn't they, Mr. Kirschmer?

A. Well, the weeds, of course, can make it rough on grain, because they weathered that cold Spring there. That is why the grain they planted later, and the weeds wasn't there, because they had just come up and then planted, and naturally the barley had a chance then to fight with the weeds and probably would have won.

Q. When was this three weeks of cold that you spoke about, or do you remember?

A. Probably—there was one week in May that wasn't so bad, but after that it got bad, after the wheat come up it got cold and wet.

Q. Was the cold season over with by June 10th or 12th?

A. Yes, I think it was, as near as I can tell, I wasn't there, but I am assuming that was about it.

Q. And at that time you don't know what the stand of the grain was?

A. No, I didn't know, I wasn't there then.

Q. When did Mr. Barr dispose of or assign this contract that he entered with you for the leasing of this property which expired in 1963, dated De-

(Deposition of A. G. Kirschmer.)

ember 7, 1953? When did he assign that to the Farnams?

A. I don't know, I just heard of that about harvest time.

Q. Where are the Farnam boys now?

A. They are on the place, on the Meiss Ranch.

Q. How many acres did they plant last year?

A. I think they planted about all the acres that were prepared to plant. They didn't get it all in either. There was some left they just didn't work because of the alkali.

Q. Did you have a drouth—freeze-out this year?

A. Yes, it froze out this year.

Q. Completely?

A. Well, they harvested about \$55,000 worth of grain there, but you see what was the matter, the grain went down in grade. They had quite a few bushels, but it wouldn't grade No. 1 barley, so I think they had to sell it at about \$2.70, \$2.50 somewhere along there. It went down a lot in value and it went down in weight. If it don't weigh, you can't make growing barley out of it.

Q. When did it freeze, Mr. Kirschmer, this year?

A. They had one freeze they tell me in July, or June, one in June and one the twentieth of August, and that is the one that I think gave them their damage.

Q. About what proportion of the crop did they lose?

A. Well, every bit of it was damaged to the ex-

(Deposition of A. G. Kirschmer.)

tent of, at least to the extent of fifty percent.

Q. About fifty percent of the crop?

A. Fifty percent, yes, worse than that, I would say sixty-five percent of the crop was damaged from the freeze.

Q. And it was not only damaged, but—do you mean it died out completely?

A. I mean that it reduced the income to that extent.

Q. By sixty-five percent?

A. That is right. You see the boys had 2,000 acres of Fall plowing and that is why they had a wonderful chance to make a big crop.

Q. Where do the Farnam brothers live?

A. Before?

Q. No, now. A. They live on the ranch.

Q. Oh, they live on the ranch? A. Yes.

Q. How many acres in that whole ranch, Mr. Kirschmer?

A. Thirteen thousand two hundred acres.

Q. And how much of it was under cultivation?

A. Well, around a little over four thousand acres, I don't know exactly, something over four thousand acres.

Q. You say something over four thousand acres?

A. Yes.

Q. Would you say forty-five hundred?

A. I don't think it was quite that much.

Q. It was over four thousand? A. Yes.

Q. Between four thousand and forty-five hundred?

(Deposition of A. G. Kirschmer.)

A. Yes, between four thousand and forty-five hundred, that is where it belongs.

Q. When you arrived there, how many harvesters were running, or being operated, I should say?

A. Well, there was a self-propelled running, and it occurs to me two of those big twenty foot machines.

Q. Was Mr. Barr there when you arrived?

A. He was there at first, but he wasn't there when I left. He had left for home by that time. I tell you, he had two rigs running, at least when they could do it they would pull two combines, but I believe when they got in that weedy stuff they had to unhook that one, they just couldn't handle it; it would choke down.

Redirect Examination

Q. (By Mr. Kester): Just a few more questions: You mentioned during 1952 the crop produced about \$10,000 to \$15,000 more than it did in '53, is that correct? A. Yes.

Q. And I believe you also said that in '52 the price per bushel was \$4.10 whereas in '53 the price was \$3.00.

A. That is right, and oats was relative difference, about the same.

Q. So that the larger money return in '52 was primarily due to the better price in that year, wasn't it? A. Yes.

Q. Now, Mr. Kirschmer, Mr. Tonkoff asked you with respect to some ground that was plowed up because it was weedy? A. Yes.

(Deposition of A. G. Kirschmer.)

Q. Did you have any objection to that being done?

A. No, I never was much of a hand to try to harvest a crop that was half weeds and half grain, so I don't object to those things.

Q. Do you feel that that was a good farmer-like practice? A. That was good practice.

Q. And that would preserve the land for the following year, wouldn't it? A. Yes.

Q. Counsel asked you with respect to some ground that was cracked; where did that ground lie?

A. That was that hard gumbo land that cracked so bad.

Q. That was on what you call the fringe areas?

A. Yes, fringe and approaching the fringe. There was some of the flat land that is fairly hard, a little of it, as I remember it, it was kind of a break between the peet and the gumbo. It was kind of where she run together, and even that cracked pretty bad.

Q. The peet land down in the old lake bottom, that doesn't crack?

A. No, it don't seldom ever crack much; it might crack a little, but it is already spongy when it is dry, kind of spongy. That would burn, that peet land. You can set it afire.

Q. But it is primarily the gumbo land up around the edge that cracked when it is dry?

A. Yes, that is what they talked about irrigating. That is gumbo land.

(Deposition of A. G. Kirschmer.)

Q. Is that the same land that you said had not been prepared so that it could be irrigated?

A. It wasn't prepared sufficiently to do a volume job of irrigating, or a good job of irrigating; it would just be kind of a half irrigating job. It was somewhat on the discouraging order to try to do it. You could go at it and get some water on it, but it wouldn't make any money. It would just be kinda of a half way irrigating job, something on a discouraging order to try to do it. You could go at it and get some water on it, but it just wouldn't make, it wouldn't make any money. I tell you, it just wasn't set to irrigate that kind of a acreage, wasn't prepared.

Q. Suppose they had wanted to irrigate it, was there water available with which to irrigate it?

A. All they could have done was with lake water, and, of course, at that time, it was of questionable merit.

Q. In other words, the only water available was the lake water, and the lake water was so full of alkali that it couldn't be used, and there wasn't anything to irrigate it with?

A. Well, of course, I wasn't there to check the water, but that is the report we get on the water. By mid-season it gets so heavily alkalied that it isn't good practice to use it. The Soil Conservation and even the AAA Office have recommended not to use it.

That wasn't the big objection; the big objection is the lack of preparation for irrigation, lack of

(Deposition of A. G. Kirschmer.)

arrangement. Nobody had ever irrigated and nobody had ever prepared it to irrigate, and it was just a haphazard operation, the best you could have made of it. There was no pump there to pump any quantity of water. They could have pumped some water, sure.

Q. Has that been irrigated since then?

A. No, the boys didn't irrigate it.

Q. And during the eight years that Jim Stevenson had operated it, he hadn't irrigated it either?

A. There was no preparation made for irrigating. You could have irrigated a few acres, of course.

I am giving you my opinion, my exact opinion of the thing. I feel just like I am talking. I irrigate enough here to know what it takes to irrigate. You have got to be prepared to irrigate.

Q. Counsel asked you whether Bud Stevenson had said that the crop should be irrigated and you testified that Bud did say that it should be irrigated.

A. Yes, that is right.

Q. Did you also make inquiry of other people besides Bud Stevenson to find out whether it should be irrigated?

A. No, I called Clay and talked to Clay about it after I talked with Bud. Clay said he would go look into the feasibility of irrigating that acreage, but, of course, I realized when I talked to him there was no facilities there to irrigate a lot of ground, but I figured he could irrigate what he could get to with the one pump he had there.

Q. Did you ever talk to Jim Stevenson about the advice of irrigating?

A. Yes.

(Deposition of A. G. Kirschmer.)

Q. What was his idea?

A. His idea was, there was very little merit to it, due to the fact that you generally catch frost on your crop if you irrigate it.

Q. Why is that?

A. It retards the maturity date.

Q. In other words, if you irrigated in the middle of the season you get a regrowth?

A. You get a regrowth, and the regrowth will retard the maturity. That is old Jim's philosophy.

Q. So then if you have an early frost and you are caught like they were this last year, you may lose it all; whereas, if you take a chance on not irrigating you will at least get a crop of some kind?

A. You will get what is there, which was nothing practically last year.

Q. Mr. Tonkoff asked you if a good farmer-like operation would mean spraying for weeds and I believe you said that it would; would that be true that the spraying of weeds would endanger the crop itself?

A. You would have to use a heavy amount of spray to kill a rather bad weed crop, yes, you are in danger of damaging your crop.

Q. In that event, would you say that it would be good farmer-like practice to spray for those heavy weeds and thereby endanger the crop?

A. I would say that if I had been out there, as I see it, if I had been out there in June and took a sprayer out there, commercial sprayer, and he would have told me that he was afraid that it

(Deposition of A. G. Kirschmer.)

would do more damage than good, I would have probably took his advice, or I might have come out the outside, put a light spray on it to hold the weeds in check and let what grain that was there try to make something; I might have done that. I wasn't there, so I couldn't say for sure, but I do know there is danger in putting a heavy spray on an anemic crop like that was to start, it was already anemic.

Q. In other words, it was a question of judgment there? A. A question of judgment.

Q. And somebody had to decide. The same thing is true of irrigation, it is a question of judgment and somebody has to decide?

A. Yes, because it was a question of judgment, there was no prior arrangement made for irrigation. It wasn't set up for it, and you could have irrigated, yes, but you would have had to have went in there in the field and made a lot of ditches, a lot of levies and surveyings. It was all too late for that after that come to the surface.

Q. And as one of the owners, you were satisfied with the judgment that was exercised, were you not?

A. Yes, I would say that under the circumstances I would have to be satisfied with them; I wasn't satisfied with the returns, of course, not, but I simply realized that it was an awful difficult operation after he got in there.

Q. Counsel asked you some questions with respect to what the yield might have been under the

(Deposition of A. G. Kirschmer.)

best of circumstances, you offered some figures, at one time I think you mentioned \$250,000. and another time you mentioned \$300,000, which you might have expected to get if everything had been the best. At the time Clay Barr went in there, did you have any expectation of getting anything like that?

A. I did figure it would make more than it did make, but I did figure that what he had planted was going to make something, but that didn't make nothing, so I was just naturally completely disappointed in every way.

Q. In other words, when Clay Barr went in there it was just a matter of salvaging what he could out of a poor situation?

A. It was just a matter of getting all done you can for the time of the year he went in, and then when he was held up by cold and wet weather longer, it just made a bad situation worse.

Q. I believe at one time you used the expression "Float the land," do you mean by that to level it?

A. Yes, they have those big land planes, they call them, and they set a blade at a certain depth at the high places. If that ground had been floated, and it carries dirt to the low places and picks it up which would have taken, you could have floated about ten acres a day, you could have probably done all right with it. Water can be spread if you will prepare it, but we wasn't prepared for it.

Q. Counsel asked you whether you have interest

(Deposition of A. G. Kirschmer.)

in that \$15,000. that Clay Barr assigned to you and you said you didn't. I am not sure that I understand what you mean by that. Do you recognize that this assignment to you of that amount is a valid obligation from Clay Barr to you to see that you get that \$15,000?

Mr. Tonkoff: We are reserving all of our objections now.

Mr. Kester: Yes.

Mr. Tonkoff: As to leading and everything else.

Mr. Kester: I think that we said at the outset that objections to the form of the question should be made now.

Mr. Tonkoff: Well, I object to that as being leading.

Mr. Kester: I will reframe the question then.

Q. Do you claim any rights under this assignment that Clay Barr made to you of \$15,000?

A. Of course, I don't understand the legal technicality of the situation, but when I said that I did not claim any rights in it, because Clay was up to date with his payments, and I presume I could hold it for security for further securing what he owes, but then I didn't feel that that was necessary.

Q. I believe you said that the note that you have from Clay Barr permits payment of any amount, does it? A. Yes.

Q. Now, when you took this assignment of the \$15,000. from him, did you treat that as an application on this \$24,000? A. That is right.

(Deposition of A. G. Kirschmer.)

Mr. Tonkoff: We object to that as leading and suggestive.

A. That is right, that is what I assumed that if he wanted to pay \$15,000. he had a right to.

Q. Did you accept on that basis? A. Yes.

Q. Did you mean by your testimony here before to renounce any rights you might have under that assignment?

Mr. Tonkoff: Objected to as leading and suggestive.

Mr. Kester: I think that question is all right.

Q. Did you intend to renounce any rights you might have under that assignment from Clay?

A. Yes, I think that is what I meant by when I felt it wasn't necessary for me to hold it for further collateral, that I was well secured.

Q. In other words, you say you feel that Clay will be good for it whether you get it out of the \$15,000 or not?

A. Yes, that is the way I looked at it. I really felt, speaking properly, that the thing was in litigation and all tied up and I just figured that I didn't want nothing to do with it.

Recross Examination

Q. (By Mr. Tonkoff): How much is the balance on that note? Do you happen to know, Mr. Kirschmer?

A. I think it is \$85,000. and interest from February.

Q. That is payable as you said, yearly?

(Deposition of A. G. Kirschmer.)

A. Yes.

Q. And Mr. Barr still owes you that on that note?

A. On that elevator note, yes.

Mr. Tonkoff: Mr. Kester, are you going to waive Mr. Kirschmer's signature?

Mr. Kester: Yes, that is all right with me.

Mr. Tonkoff: Are you going to make these a part of the deposition, these photostats?

Mr. Kester: If permissible, I would like to withdraw them to have them to work on, and I will make you copies of them if you want to have copies.

Mr. Tonkoff: Would you? I would appreciate it.

Mr. Kester: Would you note that on the deposition so that I don't forget it.

The Notary: I would be glad to have photostats made and attach copies to each copy of the deposition.

Mr. Tonkoff: That will be all right.

Mr. Kester: That will be all right, and you may attach the originals to the original copy of the deposition.

(Witness excused)

[Title of District Court and Cause.]

DEPOSITION OF FRANK KOFUES

The deposition of Frank Kofues was taken pursuant to stipulation at 12 o'clock noon, January 6, 1955, at the Sahara Hotel, Clark County, Nevada.

Appearances: J. P. Tonkoff, Attorney for Plaintiffs, and Randall B. Kester, Attorney for Defendants, Clay Barr and Betty Barr.

By Mr. Kester: It is stipulated that the deposition of Frank Kofues may be taken at this time and place as a witness on behalf of the defendants Barr before Martha M. Lundy, official court reporter and notary public of the State of Nevada; that all objections as to competency, relevancy and materiality may be reserved until the time of trial, but objections as to the form of the question should be made at this time. Either party may use the deposition in lieu of the testimony of the witness if he is unable to attend at the trial.

FRANK KOFUES

was called as a witness on behalf of the defendants Clay Barr and Betty Barr and after having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Kester): Mr. Kofues, the purpose of this proceeding is to ask you questions with respect to this lawsuit, the court reporter will take down the questions and answers, they will be filed with the Court. Under the rules of court you have

(Deposition of Frank Kofues.)

the privilege, if you wish, of reading and signing the deposition afterwards. However, we will waive the signature if that is all right with you.

A. Well, we won't have time.

Q. We will rely on the court reporter to take it down accurately. Would you state your name and address, please?

A. Frank S. Kofues. My legal residence is 6803 Lakewood Boulevard, Dallas, Texas.

Q. What line of business are you engaged in?

A. Investments.

Q. Are you acquainted with the ranch property known as the Meiss Ranch in Northern California?

A. Yes.

Q. Did you arrange to purchase that property in 1952? A. Yes, sir.

Q. From whom did you make the purchase?

A. Stevenson.

Q. Is that James?

A. James Stevenson.

Q. And after purchasing from him, did you bring A. G. Kirschmer in? A. Yes.

Q. And thereafter you and he carried out a contract of purchase from Stevenson, did you?

A. Yes, sir. I wish to make a slight correction. Mr. Higgins purchased from Stevenson and we purchased from him.

Q. Mr. Higgins is a real estate broker in Spokane, is he? A. Yes.

Q. When did you first become acquainted with the Meiss Ranch?

(Deposition of Frank Kofues.)

A. Oh, in the spring of '52.

Q. Did you look at it yourself or did you have—

A. No. Mr. Kirschmer.

Q. It was based partly on his report that you entered into the purchase? A. Yes, sir.

Q. Who was operating the place when you purchased it?

A. Mr. Stevenson and family.

Q. Did he continue to stay on in that vicinity for a time after you purchased it?

A. Oh, we employed his son, Bud Stevenson, to be our superintendent of operations.

Q. At the time you bought the property in 1952, had the crops already been planted?

A. Oh, yes.

Q. Did Bud Stevenson carry on with the harvest in the fall of 1952? A. Yes.

Q. Then did he continue on into the spring of 1953 to start preparation for the 1953 season?

A. Yes.

Q. Would you tell us what the situation was in the spring of '53 as far as you and Mr. Kirschmer were concerned with respect to the management of the ranch?

A. We were very unsatisfied.

Q. And generally speaking, without going into detail, what was the source of that dissatisfaction?

A. Incompetence.

Q. On the part of Bud Stevenson?

A. Bud Stevenson.

Q. Did you and Mr. Kirschmer then arrange for

(Deposition of Frank Kofues.)

Clay Barr to come in and take over the management? A. Yes, sir.

Q. What was the arrangement you made with Clay Barr?

A. A lease, crop lease on shares.

Q. About what time of the year, then, did Clay Barr start operating the ranch?

A. As I recall, approximately May 1.

Q. Did you personally visit the ranch at that time? A. Not to my knowledge.

Q. What was the situation about your personal participation in the operation of the ranch?

A. I left that up to Mr. Kirschmer, who is qualified to handle the farming, that was his business.

Q. Mr. Kirschmer was an experienced farmer?

A. Yes.

Q. Have you had farming experience yourself?

A. Oh, in a way, in a speculator's way but not in actual farming.

Q. So you left that up to Mr. Kirschmer?

A. Yes.

Q. Were you then personally familiar with the things that were done during the summer in the way of preparing for and making the crops?

A. No, not as much as I should have been.

Q. Now, at the time the lease was made to Clay Barr, were there some other outstanding leases to other people?

A. Yes, there was three other leases.

Q. What were those?

A. One to Ratliffe on a potato contract, one to

(Deposition of Frank Kofues.)

Lee Scarlett on potatoes, one to Noakes for the lease and option to purchase 800 acres, who was the tenant on the 800 acres from Mr. Stevenson.

Q. You have brought with you here the lease to Mr. Ratliffe, have you? A. Yes.

By Mr. Kester: I will ask that be marked for identification. (Exhibit marked by reporter as Defendant Barr's Proposed Exhibit A.)

Q. Is this a signed copy of the lease to Mr. Ratliffe? A. Yes.

Q. Was there a similar lease to Mr. Scarlett?

A. Yes.

Q. You don't have that with you at this time, however? A. No, sir.

Q. Did it provide generally the same type of things? A. Generally the same lease.

Q. About how much land was covered by the two leases for potato land?

A. Approximately 240 acres.

By Mr. Kester: We will offer this in evidence.

Q. That lease contained a provision that the lessors agree to provide irrigation, water, for the potato land? A. Yes, sir.

Q. Was there a similar provision in the lease to Scarlett? A. Yes.

Q. Did Noakes have any provision for water for the 800 acres that he was renting?

A. Yes, he had his own wells on that 800 acres.

Q. Were you personally familiar with the manner in which the water was allocated that summer?

A. I do not recall.

(Deposition of Frank Kofues.)

Q. Did you visit the ranch during the season of 1953 at all?

A. I believe I made one trip. I know I made one trip while they were preparing to harvest, and I am not quite sure whether I made a trip earlier.

Q. At the time you went there during the start of the harvest season, did you make any personal observation as to the condition of the crops, or did you feel that——

A. A large part of the land was grown up in weeds which I was unsatisfied with and I subsequently found out that it was not the tenant's fault, that the crop was improperly planted last season.

By Mr. Tonkoff: I move that all that latter part be stricken.

Q. By Mr. Kester: That weed patch that you spoke of, where did that lie with respect to the ranch house? Would you say approximately where it was; immediately north of the ranch house?

A. I can't say the direction; it is close to the other cultivated area.

Q. Was it between the dyke and the road which extended from the ranch house up into the cultivated area, or do you recall the lay of the land well enough to recognize?

A. Oh, I recall it is between the road and lake, the road and the levee around the lake.

Q. At the time Barr went in there in May 1953, what was the situation as far as expectation of a crop that year?

(Deposition of Frank Kofues.)

A. I expected a larger crop than we harvested. It was late in the season, though, when Clay went on the ranch.

Q. Was the reason for Clay going in there to salvage what could be done out of the operation?

By Mr. Tonkoff: Objected to as as leading and suggestive.

Q. By Mr. Kester: Well, put it this way: What was the particular occasion for Clay having to come in at that time of the year?

A. Well, it was improperly being farmed by our superintendent.

Q. Now, considering the conditions as they existed when Clay Barr went in there, did you, as an owner, have any criticism of the way Clay Barr operated the ranch that summer?

A. I was unsatisfied with the results of the crop. Subsequently I found out that part of the soil, a great portion, is not suitable for farming operation.

By Mr. Tonkoff: I move all the latter part of that answer be stricken.

Q. By Mr. Kester: As an owner of the property did you make an investigation of the nature of the soil there?

A. Subsequent to this crop?

Q. Yes. A. By Government reports.

Q. What did you find as to the character of the soil generally there?

A. It was not—the soil was not as good as I

(Deposition of Frank Kofues.)

was led to believe it was when I purchased the ranch, that is, portions of the soil.

Q. Do you still have an interest in the ranch?

A. Oh, yes.

Q. What is the present situation as far as the ownership is concerned?

A. It is on a contract of sale to Fornam Brothers.

Q. At the time the crop was harvested in '53 did you participate in the arrangements for the sale of the crop?

A. Well, Mr. Kirschmer handled the marketing of the crop. I participated in the results.

Q. Do you recall whether you personally signed any of the sale documents to Kerr-Clifford Company, or who signed them in your behalf?

A. I believe I helped market the crop with Mr. Kirschmer. Naturally we both signed the sale.

Q. The crop was sold to Kerr-Clifford Company?
A. Yes.

Q. Did Bud Stevenson participate in the sale of the crops for your share of the crops?

A. I made the sale with Mr. Kirschmer direct myself at the Willard Hotel in Klamath Falls.

Q. That was to some representative of Kerr-Clifford who met you at the hotel?
A. Yes.

Q. Now, are you in a position to be able to tell us anything about such matters as irrigation or operating the other technical aspects of the farming operation?

(Deposition of Frank Kofues.)

A. I would rather Mr. Kirschmer answer those questions.

Q. You left that all up to him? A. Yes.

Q. You were satisfied with Kirschmer's judgment on the situation, were you?

A. Oh, yes.

Q. And still are as far as that is concerned?

A. Yes, sir.

By Mr. Kester: That is all.

Cross-Examination

Q. By Mr. Tonkoff: Mr. Kofues, when did you first meet Barr?

A. Oh, I believe it was in '51.

Q. And at that time did you have any business transactions with him? A. Yes, sir.

Q. What was the nature of that transaction?

A. I sold him a grain elevator in Burlington, Colorado.

Q. What was the sale price of that elevator?

A. It was \$119,000 cash, \$100,000 note retained, and exchange for other properties and notes for the balance of the consideration.

Q. What was the total consideration for the building?

A. Well, it was really an exchange. I received a ranch near Kalispel, Montana, stocked with approximately 500 head of cattle, clear of debt.

Q. That was Mr. Barr's, was it?

A. Mr. Barr's, and another ranch close to Spo-

(Deposition of Frank Kofues.)

kane near Okanogan, and a note on a hardware and implement business in Walla Walla, Washington.

Q. The total amount of that sale was around \$750,000, wasn't it?

A. Figuring from the trade aspect the results of the deal have been more than satisfactory, that is, I traded the ranch for a hotel at Klamath Falls and made an especially good trade.

Q. You own the Willard Hotel? A. Yes.

Q. Now, the note Mr. Barr delivered you was in the sum of \$100,000? A. Yes.

Q. What interest did that bear?

A. I do not recall, I believe it was 5%.

Q. How was that payable?

A. Payable annually.

Q. What were the payments?

A. I do not recall.

Q. Well, has that note been paid?

A. It was—I sold it in current condition to Mr. Kirschmer at par.

Q. At par value? Now, after that, did you have any other transaction with Mr. Barr prior to the Meiss Ranch operation?

A. Well, I assisted Mr. Barr in obtaining a lease on the elevator.

Q. Then did you give Mr. Barr a lease on this ranch, this Meiss Ranch?

A. Yes, Mr. Kirschmer and I gave Mr. Barr a lease on this ranch.

Q. What was the term?

(Deposition of Frank Kofues.)

A. Ten years, as I recall.

Q. That lease commenced in 1953 and ended in 1963?

A. Yes, sir.

Q. He operated the ranch just that one year?

A. Yes, sir.

Q. You say now that the Fornam Brothers are purchasing the ranch from you and Mr. Kirschmer?

A. Yes.

Q. The sale price of that ranch to you was \$1,250,000, wasn't it?

A. When I purchased it?

Q. Yes. A. \$1,200,000.

Q. Then Mr. Kirschmer purchased a half interest?

A. That is right.

Q. Well, now, when was this transaction made with Fornam Brothers for the purchase of this ranch?

A. After the crop was harvested in 1953. Negotiations were entered into in the fall of 1953.

Q. Did you cancel Mr. Barr's lease?

A. Mr. Barr sold his lease to the Fornam Brothers and I rearranged the lease, the cancelled lease, and sold the ranch under conditional sales contract.

Q. Now, when did Mr. Barr's operation or his right to possession or his possession cease in 1953?

A. After the crop was harvested.

Q. What month would you say that was, Mr. Kofues, do you recall?

A. Well, let's see—latter part of October.

(Deposition of Frank Kofues.)

Q. Did you examine the crop prior to the time it was harvested?

A. No, I do not recall being up there.

Q. Did you examine any of the property at the time you visited at the time the crop was being harvested? A. Just casually.

Q. What portion of the crop was harvested when you visited the property?

A. Well, they were harvesting barley at that time.

Q. Did you see where the weeds were? You mentioned weeds.

A. Yes, there was a large patch where weeds took over the crop.

Q. About 400 acres, wasn't it?

A. Oh, I don't recall the exact amount of the acreage.

Q. Did you have any personal knowledge Mr. Barr had plowed up some of the crops during the summer of 1953?

A. I believe that Bud Stevenson called me and made some complaints of part of the land not being properly harvested.

Q. You mean irrigated, don't you?

A. Well, talking about the weeds being sprayed—not being sprayed, farmed.

Q. He did call you and complain the property wasn't sprayed? A. Yes.

Q. That was during the summer, during the growing season, was it not?

A. Yes, during the summer.

(Deposition of Frank Kofues.)

Q. That would have been along about in July?

A. I would say July or August.

Q. Now, at that time or at some other time during the summer, did you receive any complaints from Mr. Bud Stevenson, your superintendent, that the crops were not being properly irrigated?

A. He called me one time and complained about the crops being not properly irrigated.

Q. Weren't properly or were?

A. Were not.

Q. Do you remember about what time of year?

A. Well, it was late in the year, I would say August.

Q. In August? A. Yes.

Q. You hadn't seen the property up to August?

A. No.

Q. Or the condition of the crops? A. No.

Q. But your best recollection is that it was in August, is that right?

A. My best recollection.

Q. Could it have been in July?

A. I couldn't say.

Q. Do you know where Mr. Stevenson contacted you, as I understand you are all over the country?

A. I believe it was in Santa Monica.

Q. You didn't go up to examine the property?

A. No.

Q. Did you tell him anything about whether he should irrigate or not?

A. Well, I told him to take it up with Mr.

(Deposition of Frank Kofues.)

Kirschmer who was handling the operation of the farm.

Q. Do you remember about when you got up to the Meiss Ranch when the crops were harvested, what time of the year, what month?

A. I believe it was in October.

Q. Had most of the crops been harvested at that time?

A. No, I would say a fair portion of the crops.

Q. Did you see the condition of the crops that were not harvested?

A. I didn't go in the fields.

Q. For example, did you see some of the grain was about, oh, knee high?

A. No, I didn't go down in the fields to examine the grain.

Q. You didn't examine the condition of the soil? A. No.

Q. You didn't see any cracks in the soil by reason of lack of moisture?

A. I do not recall looking over the ground.

Q. There were other crops there grown of similar kind, other grain crops such as wheat, barley and rye, about the vicinity and about the ranch?

A. Yes.

Q. Did you happen to observe any of those crops? A. No, sir.

Q. What were your expectations per acre, the bushels per acre?

By Mr. Kester: Expectation as of what time in

(Deposition of Frank Kofues.)

1953? You mean in the spring or during the season?

A. I would say on the best land, 3000 pounds.

Q. By Mr. Tonkoff: That would be about 60 bushels, 65? A. About 50 dry bushels.

Q. That land is lake bottom, is it not?

A. The Government map shows all the classes of soil. I did not examine that when I purchased the land. I examined it after Mr. Barr made his crop.

Q. Now, you said that Noakes had an 800-acre lease? A. Yes, sir.

Q. And you say he had his own wells for his own irrigation? A. Yes.

Q. Did they have pumps or take the water out of the lake?

A. Electric pumps, shallow wells.

Q. So that he was not dependent upon the water that was available for the ranch for irrigation?

A. Very small part of it.

Q. That ranch contains about 14,000 acres?

A. About 13,000.

Q. What portion of that property has been cultivated or under cultivation?

A. I would say about 3,500 acres.

Q. And you had 800 leased to Noakes? There was an existing lease for 800 to Noakes?

A. Yes.

Q. And it had about 200 in potatoes?

A. Yes.

Q. So that left about 2,500 acres?

(Deposition of Frank Kofues.)

A. I think that is approximately right.

Q. Do you know how many acres were available for grain crops?

A. I thought the full 2,500 at that time.

Q. And were 2,500 acres planted?

A. That is what I recall.

Q. That property was capable of producing crops valued at about \$300,000, wasn't it, under ideal conditions?

A. That is what they claim, but it made a good crop one time to my knowledge. There was a frost failure this year.

Q. You say it made a good crop?

A. One time before we bought it. Very bad frost condition.

Q. You had no frost condition in 1953?

A. No.

Q. The growing conditions were ideal at that time?

A. I understand.

Q. What were the big crops produced there that you know about, what did they bring?

A. That was when barley was at a very high premium value and that was, I think, two years before I purchased the ranch.

Q. What was the value?

A. I didn't see the results except Mr. Stevenson said it made a wonderful barley crop.

Q. Do you remember the amount of the proceeds?

A. I think it was around \$400,000, but barley was of high premium that year.

(Deposition of Frank Kofues.)

Q. That was in 1951 then?

A. Oh, I believe so.

Q. Do you have any pending transactions with Mr. Barr? A. No, sir.

Q. Your business relationship ceased after this transaction?

A. No, I was discussing a deal with him a few months ago. No, I am open to deal with Clay any time.

Q. That wasn't exactly that I was driving at. What I mean is have you had any other transactions with Mr. Barr since this ranch deal?

A. No.

Q. You don't have any now?

A. Very—we discussed a deal a couple of months ago.

Q. In other words, you are negotiating?

A. But it hasn't materialized.

Q. You are negotiating? A. Yes.

Q. Is that ranch property?

A. Trading a hotel I have in Montana for a farm which Barr operates in Washington.

By Mr. Tonkoff: That is all. Thank you very much.

Re-direct Examination

Q. By Mr. Kester: Counsel asked you about what you might expect of a crop on the ranch and you mentioned the possibility of maybe 55 bushels per acre.

A. That is on the best land.

(Deposition of Frank Kofues.)

Q. On the best land and under the best conditions? A. Yes.

Q. At the time Barr went in there in May of 1953 did it look as though the crop would be that good on the ranch?

A. I let Mr. Kirschmer work out the details. I do not recall going on the ranch at that time.

Q. So that 55 bushels per acre would be the maximum under best conditions, sir?

A. That is right.

By Mr. Tonkoff: That is leading and objected to.

By Mr. Kester: That is all. The document that has been marked, may it be stipulated that I withdraw that and make it available to you at any time?

By Mr. Tonkoff: Yes.

Notary Public's certificate attached.

[Title of District Court and Cause.]

DEPOSITION OF HORTON HERMAN

617 Spokane & Eastern Building, Spokane, Washington, Friday, September 30, 1955.

(Whereupon, at eleven o'clock, a.m., the above-entitled matter came on pursuant to subpoena duces tecum attached and notice of intention to take deposition filed with the Clerk, United States District Court, Eastern District of Washington, for the

(Deposition of Horton Herman.)

taking of the Deposition of Horton Herman before
Oren J. Casey, Certified Shorthand Reporter, and
a Notary Public.)

HORTON HERMAN

called as an adverse witness on behalf of the plain-
tiffs, being first duly sworn, testified as follows:

Cross Examination

Q. (By Mr. Tonkoff): Your name is Horton
Herman? A. Right, sir.

Q. What is your profession? A. Lawyer.

Q. How long have you been practicing in Spo-
kane, Washington? A. Since 1938.

Q. Of course you are licensed?

A. Right.

Q. Now, in 1953, who did you represent in the
case of Welch vs. Clay Barr and Sterling Higgins,
Cause No. 135666, an action filed in the Superior
Court of the State of Washington, in Spokane
County?

A. My partner, Bill Ennis, and I represented
Clay Barr and his wife.

Q. At that time you and William Ennis were
partners? A. Yes.

Q. And were officing where?

A. Paulsen Building.

Q. Now, do you have an amended complaint or
the complaint on which we went to trial?

Mr. Kester: Perhaps I should make a record
here. Is it understood that all objections are re-

(Deposition of Horton Herman.)

served until the time of trial? For example, if you are intending to go back into the history of that litigation I doubt its relevance or materiality, but I don't want to encumber the record with a lot of objections if you can reserve them all to the time of trial.

Mr. Tonkoff: Certainly, that is satisfactory with me. You are reserving all objections save as to form?—

Mr. Kester: Yes.

Mr. Tonkoff: —in order to save time?

The Witness: I think I have got it right here. No, that is your—I have the original—I mean a copy—of the complaint.

Q. (By Mr. Tonkoff): Well, Mr. Herman, would you examine that and see if that is the complaint upon which we went to trial?

A. Well, without reading it in detail, it appears to be, yes. There are some interlineations which I assume were those made—appears to be. I have no independent recollection of it.

Mr. Tonkoff: Mark that.

(Instrument handed the Reporter was marked Plaintiffs' Exhibit for Identification No. 1, Witness Herman.)

Q. (By Mr. Tonkoff): Plaintiffs' 1 for Identification. To refresh your recollection, we went to trial about the first part of June, did we not?

A. I believe so, of 1953.

Q. And during the course of that trial a settle-

(Deposition of Horton Herman.)

ment was arrived at between the plaintiffs and the defendants, was it not?

A. Yes, I believe so.

Q. And was that reduced to writing, Mr. Herman? A. Yes.

Q. Do you have the agreement?

A. I may have. I think there were two agreements.

Mr. Kester: Before you leave the subject of this complaint, I notice some interlineations, particularly in the prayer for damages. Can you advise me if those were amendments made or personal notes?

Mr. Tonkoff: Those were amendments made in Court on an argument of a motion. We amended in Court. Isn't that correct, Mr. Herman?

A. It could be. We met several times in Court.

Mr. Kester: This particular copy, was that the one from Mr. Tonkoff's file?

Mr. Tonkoff: Yes.

The Witness: Yes. That is the writing—the writing on that exhibit 1 is your writing, isn't it, Mr. Tonkoff?

Mr. Tonkoff: Yes, that is.

The Witness: I have here an original of an assignment, in answer to your question.

Q. (By Mr. Tonkoff): Is that from Mr. Barr and his wife? A. Yes.

Mr. Tonkoff: Will you mark that?

(The instrument handed the Reporter was marked Plaintiffs' Exhibit No. 2, Witness Herman, for Identification.)

(Deposition of Horton Herman.)

Q. (By Mr. Tonkoff): Do you have the Trust Agreement? A. I don't know.

Q. It is entitled "Declaration of Trust".

A. I see several copies of it.

Q. Do you have a copy of it? That will be satisfactory if you have. That is it right there, isn't it?

A. No, this is Demand and Release. Well, apparently the only one I have is where they are combined. That is not a true copy. That is one that has been made later.

Q. You don't have an exact copy of it?

A. I thought I did have somewhere. I have got three files involving this.

Mr. Tonkoff: Mark this Exhibit 3.

(The instrument handed the Reporter was marked Plaintiffs' Exhibit No. 3 for Identification, Witness Herman.)

Q. (By Mr. Tonkoff): Examining Plaintiffs' Identification 3, Mr. Herman——

A. That appears to me to be a true copy of the Declaration of Trust which includes in it the assignment. Exhibit 2.

Q. You are talking about Exhibit 3, is that right?

A. That is right. It appears to me to be an exact——

Q. That was entered into on the 10th day of June, was it not?

A. I will have to see. That would be about the date. It is the date the instrument bears.

(Deposition of Horton Herman.)

Q. It was drawn in your office in Spokane, Washington here? A. Yes.

Q. Prior to the time the matter was submitted to the jury?

A. Yes. It never was submitted to the jury—the case.

Q. Now, in this assignment it provides for \$10,000.00 to yourself—second item under the Declaration. That sum was for what purpose, Mr. Herman?

A. I don't—The Declaration of Trust has an allocation of sums in it, not the assignment.

Q. Declaration,—pardon me.

A. And on page 3, the allocation to Horton Herman of \$10,000.00 was for services rendered Clay Barr and his wife in connection with the lawsuit.

Q. Which is the subject matter which is set forth in the amended complaint? A. Right.

Q. And the rest of the sums were allocated to the individuals named in the Declaration therein in the amounts specified, is that right?

A. Yes.

Q. Then subsequent to that time, prior to July the 9th, I requested you to go down to the Meiss ranch, which is in California south of Dorris, did I not? A. Well—

Q. To fly down there?

A. We had an agreement to fly down, yes. I was going to go with you but you went ahead. I couldn't make it at the time we agreed and you went ahead without me and then I never went down until a later time.

(Deposition of Horton Herman.)

Q. Well, you knew at that time that Mr. Barr had gone down with myself and Mr. Welch, did you not?

A. No. I knew that Mr. Welch had gone down. I thought ahead of you. And I don't have any definite recollection—you went down twice, I think, and Mr. Welch went down two or three times.

Q. Well, I am talking about prior to July 9th of——

A. ——of 1953.

Q. Yes.

A. No. I think the only time that I agreed to go with you was in about harvest time or something of that kind—in late August or September, it is my recollection.

Q. Well, at any rate, did I have a conversation with you after I returned from California?

A. From California?

Q. Visiting the ranch?

A. Yes. Yes, you did.

Q. At that time what statements did I make to you, Mr. Herman?

A. Well, my recollection is that you went to—twice down there.

Q. After the—After I returned the first time?

A. What statements did you make to me?

Q. Well, to refresh your recollection didn't I state to you that the property was not irrigated, not sprayed, not properly farmed?

A. I don't think—if you made those statements that wouldn't have been the first time. That would be my recollection.

(Deposition of Horton Herman.)

Q. That wouldn't be the first time?

A. No, it would be the second time that you were down there, if you made those statements.

Q. You have no recollection of me ever complaining to you about the farming operation?

A. Well, yes, you complained of the farming operation, but that was after the crop was harvested is my recollection.

Q. After the crop was harvested and never before? A. That is my recollection.

Q. Didn't I ever tell—Did I ever make any statement to you that I had moving pictures taken of the crop? A. Yes.

Q. Now, does it refresh your recollection that that had to be taken before the crop was harvested?

A. Yes, but I understood the movies were just taken to establish a condition; in other words, I don't think anybody knew the yield at that time.

Q. At any rate on July the 9th you assigned your interest to—under this trust—to Harvey S. Barr? A. Well, I assigned it at some date.

Q. Would this be a copy of that assignment which you mailed to me?

A. Yes, I think so. It looks like it.

Q. Well, you were the author of that assignment, weren't you?

A. Yes—I think actually Mr. Ennis drew it but I assigned it and if what you handed me—This is an original of it, I believe.

Mr. Tonkoff: Will you mark that Exhibit 4.

(Deposition of Horton Herman.)

(The instrument handed the Reporter was marked Plaintiffs' Exhibit No. 4, Witness Herman, for Identification.)

Q. (By Mr. Tonkoff): Who is Harvey S. Barr, Mr. Herman?

A. He is the father of Clay Barr.

Q. And you disposed of your interest—\$10,000.00—to him for what amount?

A. \$7500.00.

Q. You were paid that money, of course?

A. Yes.

Q. That was a partnership fee, was it not, for you and Mr. Ennis? A. Yes.

Q. Now, what had happened that you sold that interest to Mr. Barr?

A. Well, he had been down there apparently to—It seems to me—At that time Clay Barr had a ranch around Mikkalo, Oregon—and that Mr. Barr had been down there and had seen the crop and he came in and offered me \$2500.00 because that, he thought, was a reasonable fee for my services. He thought that the \$10,000.00 was too much. So I said “No,” I said, “Mr. Tonkoff and I decided, to conclude this case, that we would gamble and I am willing to go ahead with my gamble on the crop.” And he, he came back again and offered five and I said “No”. And then he finally concluded the agreement. You were brought in on it—whether or not you were willing to take a reduction. And you finally said that you would. And I think you signed such a thing as I signed but it was never honored

(Deposition of Horton Herman.)

because, I think, when he came to see you or you went to see him or something, he said he didn't have any more money or something, I don't know what happened on that. He negotiated with me and I went to California about the 8th or 9th or 10th of July and he concluded that with Mr. Ennis, my partner, while I was down there.

Q. Did you go to the ranch at any time?—

A. No.

Q. —at McDowell, south of Dorris, California?

A. Well, I have seen the name, Dorris, but I don't know where the ranch is.

Q. Now, did you obtain the consent of any of the beneficiaries—principally John Cramer, Charpentier or Welch before you sold your interest to Mr. Barr?

A. No. No, I don't believe I did. You and I talked about it and you agreed to it, I know, but I didn't get the consent. I don't believe I even talked with them. I may have.

Q. Well, did you have any conversation with my office concerning citing some authority to you—two Massachusetts cases concerning the impropriety of an assignment of that nature without first obtaining the consent of the beneficiaries?

A. I think when the subsequent litigation came up that Bill Holst from your office wrote me a letter.

Q. "Subsequent litigation" did you say?

A. Well, that is my recollection. I don't—

Q. Do you have the original of that letter?

(Deposition of Horton Herman.)

A. The original from——?

Q. ——Holst?

A. I have a letter here to Horton Herman signed by Bill Holst.

Q. And what does that—Would you mind reading it? What date is it?

A. It says "Request of January 25th, 1954." You asked me to resign as Trustee.

Q. No, prior to that time did you not receive a letter from Mr. Holst?

A. I think Mr. Ennis did. I didn't receive it. I think he did. But I don't—I remember, I think, talking to you once about it.

Q. At that time I advised you that the decisions were such that without the consent of the beneficiaries it would be improper for a Trustee to sell out his interest, did I not?

A. Well, you see, I took the position that I had a dual capacity with regard to that instrument—one as an individual and one as a Trustee. And I think that the Trust so spells them out. And you took the position that I had only one obligation under it and that was the one as a Trustee.

Q. Well, did you get my letter of—Did you read the letter of July 10th, 1953, written by myself to Mr. Ennis—your partner?

A. No, I don't believe I did.

Q. Is it in the file—the file that you have before you? Before you is the entire file of this case, is it not?

A. There are three files that I have before me.

(Deposition of Horton Herman.)

Q. You have the correspondence and documents?

A. I don't know whether I do. These are our complete files but whether it contains every one I don't know. I don't know; this happened sometime ago and I haven't examined it. I don't ever recall—You see, when I was in California Mr. Ennis took care of this final settlement with Mr. Barr and with you and he talked to you over the 'phone apparently. I wasn't there. I was gone for about—

Q. Do you have the original of that letter in your file?

Mr. Kester: May I see the copy?

The Witness: Yes, I do.

Q. (By Mr. Tonkoff): Would you let me see it, Mr. Herman? Mark that for identification.

(The instrument handed the Reporter was marked Plaintiffs' Exhibit No. 5 for Identification, Witness Herman.)

Q. (By Mr. Tonkoff): You have no recollection of me talking to you over the 'phone on June 30th about this contemplated trip to McDowell, California—to fly down with myself and Mr. Welch and Mr. Barr?

A. My recollection is it would not have been that early. My recollection is that our only interest in mine was at harvest time because—I won't say that we didn't talk about going down because I thought we had more or less a date for—it occurs to me that it would have been the 11th. By my recollection is that it was the 11th of September.

(Deposition of Horton Herman.)

Q. Well, subsequent to that time this action that is now pending was started in Portland?

A. Portland, yes.

Q. And you filed—You refused to join as plaintiff in that case, did you not?

A. Well, that is one way of putting it, yes.

Q. And immediately thereafter the original case was dismissed, was it not, in Portland?

A. I don't know about that. I believe you told me that that was the fact.

Q. Then you were requested to resign?

A. Right. I don't know the sequence but—

Q. Do you have a letter from Mr. Holst, my partner, asking you to resign?

A. Well, I have—I have some wires.

Q. Well, prefacing the wires, I personally asked you orally to resign here in Spokane; when I was here in Spokane I asked you, did I not?

A. Yes. Yes, you did.

Q. And at that time you advised me that you would not resign unless you were requested or demand was made of you to resign by the beneficiaries, isn't that right?

A. Well, you said "If you don't resign I will sue you to get you out of there".

Q. That is right.

A. That is what you said.

Q. Yes, that is right.

A. And I said "Well, if you share the view of all the beneficiaries, why, of course, I will resign."

Q. Then did you receive telegrams?

(Deposition of Horton Herman.)

A. Yes, I received telegrams from E. J. Welch, Roland P. Charpentier, Effie G. Charpentier and John W. Cramer.

Q. Do you have those telegrams with you?

A. Well, I have a copy. I assume that these are——

Mr. Tonkoff: Mark these 6 and 7.

(The instruments referred to were marked by the Reporter Plaintiffs' Exhibits Nos. 6 and 7 for Identification, respectively, Witness Herman.)

The Witness: And you requested me to resign as beneficiary and co-trustee.

Q. (By Mr. Tonkoff): Do you have the letter there from Mr. Holst?

A. I thought I did. I know that I received a communication from you or your office.

Q. I think you said you had it there a while ago, Mr. Herman?

A. Here, I think—is this the letter you mean? That is from you. The reason——

Mr. Tonkoff: Will you mark that one, too, that is number——

The Reporter: 8.

(The instrument handed the Reporter was marked Plaintiffs' Exhibit No. 8 for Identification, Witness Herman.)

Q. (By Mr. Tonkoff): You also have a letter there from Mr. Holst, do you not?

A. Well, I have one—or I have seen one. Yes, here is one right here.

(Deposition of Horton Herman.)

Q. Well, that isn't the one. That refers to your resignation though. That would be marked No.—

The Reporter: 9.

(The instrument handed the Reporter was marked Plaintiffs' Exhibit No. 9 for Identification, Witness Herman.)

The Witness: Here is another letter from him.

Q. (By Mr. Tonkoff): No, the one I am talking about is the one requesting or demanding your resignation?

A. I don't appear to have one in this file. Wait a minute. Well, I got such a letter but—I recall I got it from you, that you asked me to.

Q. Well, any kind of a letter?

A. I will admit I got such a letter. I don't see it.

Q. At any rate demand was made. You don't have the letter at the present time?

A. No, I apparently don't but I recall getting a letter from your office. I don't recall whether it was from you or Bill Holst asking that I resign, the same as your clients, Cramer, Charpentier and Mr. Welch had requested.

Q. And pursuant to that demand you did resign? A. Yes, that is right?

Q. Do you have a copy of that resignation, Mr. Herman?

A. Yes, here is the demand by you that I resign. It is included in the body of that demand. Is that what you meant?

Q. That is the release from you? Yes. Well, but other than that, you did——

(Deposition of Horton Herman.)

A. The other one has Welch's name. It ought to be bound together.

Mr. Tonkoff: Let's have that as one exhibit.

(The instrument handed the Reporter was marked Plaintiffs' Exhibit No. 10, Witness Herman, for Identification.)

The Witness: Yes, here is a copy of my resignation.

Q. (By Mr. Tonkoff): You served that on all of them, did you not?

A. I think I served—Yes. Yes.

Mr. Tonkoff: Mark 11 and 12.

(The instruments referred to were marked Plaintiffs' Exhibits Nos. 11 and 12 respectively, Witness Herman, for Identification.)

Q. (By Mr. Tonkoff): Did you have any conversation with Mr. Harvey S. Barr when you resigned; did you have any conversation with him?

A. No, but I wrote him a letter.

Q. Prior to the resignation did you contact him and advise him of what was going on?

A. No, I wrote him a letter and told him I was resigning. I enclosed a copy of that demand and release.

Q. What was your basis on refusing to join as plaintiff?

A. I thought that any suit should be brought by the beneficiaries individually because my interpretation of the Trustee Agreement—That is my recollection now; I haven't made a re—re-examined or restudied the thing. That my obligation as Trus-

(Deposition of Horton Herman.)

tee was to disburse the money; that I felt that Mr. Barr had breached the agreement; that the beneficiaries had a cause of action.

Q. And the Trustees didn't?

A. No, I felt from what you stated, if your case facts were true, that the Trustee funds should not be subjected to interpleader demands for attorneys' fees and costs. As a matter of fact, at the time I set forth my views completely and sent you a copy of the letter on December 12, 1953.

Q. Is this the letter? A. Yes.

Mr. Tonkoff: Would you mark that?

(The instrument handed the Reporter was marked Plaintiffs' Exhibit No. 13 for Identification, Witness Herman.)

The Witness: That is the letter in which I asked that the sums be distributed immediately.

Q. (By Mr. Tonkoff): On December 12th, the date of Identification No. 13, you had already made your assignment to Mr. Barr, of course?

A. I think that was in July of—

Q. And you were then attorneys for Mr. Clay Barr? A. No.

Q. When did your relationship of attorney and client cease?

A. Well, as far as this case was concerned, it ceased as of the time the judgment of dismissal was signed.

Q. But you handled other matters for him, did you not?

A. It seems to me that in 1954—

(Deposition of Horton Herman.)

Mr. Kester: I think I should probably object to bringing in of any other attorney-client relationships.

Mr. Tonkoff: No, I am not asking about the—what you represented him in. I merely asked him if you hadn't represented him in other matters subsequent to the time of the termination of this lawsuit in Spokane?

A. I think one time he came and had Mr. Colborn in this office look at a lease or something in connection with another piece of property that he owns, but that is all.

Q. That was at what date?

A. Oh, I don't know. I would think that would have been in the fall of—might even have been this year, I don't really know.

Q. At any rate there was still an attorney-client relationship after the suit was started in Portland?

A. No, there was not. I would say "No, that I have no continuing relationship with him." I think this office did one piece of work in something unrelated to this case. I think Lyle Colborn did that in either the first part of this year or the last part of '54.

Q. At any rate were you not in an embarrassing position to be a party-plaintiff against your own client in Portland.

Mr. Kester: Well, just a moment. I don't think there was any evidence that he ever was any party-plaintiff.

(Deposition of Horton Herman.)

The Witness: I don't know specifically what time you are referring to?

Q. (By Mr. Tonkoff): At the time the suit was started and the time you said you didn't want the suit brought against Mr. Barr?

A. I didn't say that, Mr. Tonkoff.

Q. Well, you had no knowledge at the time of the truth or the facts alleged in the complaint?

Mr. Kester: I will object to the form of the question.

Q. By Mr. Tonkoff: Did you have any knowledge of our merits of our lawsuit against Mr. Barr, who was your former client? I will put it that way.

A. Not sufficient to decide that you were right or that he was. I felt that if there was any lawsuit based upon what I understood your statement of the case was, that the beneficiaries should bring it and not the Trustees and I so advised you.

Q. Did you have a conversation with Mr. Barr after I made complaints to you about the manner in which the crop was being grown down there?

A. I think I did, yes. I think I told him that you felt he hadn't farmed the place properly.

Q. And what did he say?

A. I don't recall specifically. He said that something——

Q. Well, I will put it this way. Did he deny that he was farming the property properly in a good farmer-like manner?

A. Substantially I would say that he denied any faulty farming practice over which he felt per-

(Deposition of Horton Herman.)

sonally responsible. I have known of the Barr family for a number of years and know that they are successful dry-land farmers, you see.

Q. Yes.

A. And I have been in on—Prior to this litigation, the case you brought on—I knew some of the machinery that he had in Oregon and I have some farm ground of my own and I have some familiarity with farming practices and how difficult it is sometimes. And I think you mentioned the same to me—that you were a fruit farmer and had been all your life, and some of the problems that arose down in your part of the country.

Q. I don't remember that familiarity. At any rate you had known the Barrs for several years past?

A. I had known of them.

Q. Had you represented them previously?

A. No, my acquaintance with the Barr family arose out of employment in Colfax when their son-in-law was killed. And I was employed by the County of Whitman to assist in the prosecution of a man named Rio that murdered one of the members of their family.

Q. When was that, Mr. Herman?

A. 1948 or '9.

Q. You have known them since then?

A. Lawrence Brown was their lawyer over the years.

Q. Did you know their farming operations over there by reputation and hearsay?

(Deposition of Horton Herman.)

A. I had been to their farm in Whitman County because that was the scene of the murder.

Q. But you didn't go there to examine the farming operations, I take it?

A. No. No, it was in connection with the scene of the murder that I went.

Q. Were you influenced any by your refusal to bring the action down in Portland or join in the bringing of the action by reason of your former acquaintanceship with Mr. and Mrs. Clay Barr?

A. No, that would have made no difference to me.

Q. Well, you said—Did you say that I had related to you some of the farming conditions down on the Meiss ranch which is the subject of this declaration of trust? A. Yes, you did.

Q. You related that to Mr. Clay Barr, you said?

A. I didn't. All I did was relate to him that you were dissatisfied and I understood that your dissatisfaction came when you found out how much money was realized from the crop.

Q. Is it your testimony that you never made any statement to him prior to that time?

A. I don't recall at this time that I did, no. I don't recall that I even saw him. It is my recollection that he lived in Oregon throughout all this time.

Q. Do you have any recollection of me calling you immediately after I returned back—returned from California and told you that the property was

(Deposition of Horton Herman.)

improperly irrigated and that insufficient water was put on the grain crops?

A. I remember you telling me something like that sometime. No, I don't remember when it was.

Q. Do you remember me telling you——

A. I remember you said you were dissatisfied with him and that you thought something to the effect that whether it was failure to put on 2-4-D on the weeds or whether it was failure to put water on or what the situation. My recollection is about the water about the time we all entered into this contract that there was a threat as to whether or not the water would flood it all out.

Q. Oh, where did you get that information?

A. I think from you, from Mr. Welch who had been down there.

Q. Do you recollect of a 'phone call being made there in the course of the settlement to discover what the condition of the crops were on the 10th of June?

A. I think Mr. Welch, I think, made such a call. I don't know. I think you told me that Mr. Welch and you—Mr. Welch knew of this ranch, having lived down there.

Q. You knew that you were going to get \$10,000.00 out of this?

A. I hoped to, yes. I did, the same as you hoped to get \$15,000.00.

Q. Did you expect to get the amount set forth in the Declaration?

A. I did if the crop came through. That is ex-

(Deposition of Horton Herman.)

actly my thought at the time and that is what you and I talked about and you agreed that was okay with me, too.

Q. Your client—You made this offer and this allocation personally, did you not?

A. No, that settlement was made contrary to my advice to Mr. Clay Barr. He insisted that we make that settlement.

Q. That is true or may be true——

A. You know that that was what I told you.

Q. That is what you told me.

A. And you and I went on that basis.

Q. At any rate you and your client agreed to allocate those different sums to the parties named in the Declaration?

A. Yes, that is right. The agreement, I think, speaks for what our agreement was as I understood it.

Q. Well, the work that you put in this case you expected to be paid for it?

A. Yes, I agreed to try and defend that case for substantially less than I eventually realized.

Q. What was your value of your services in this case?

Mr. Kester: I object to that. It has no bearing in this case.

Mr. Tonkoff: He can answer that.

Mr. Kester: No.

Mr. Tonkoff: I insist on the answer.

Mr. Kester: Take it to the Court.

Mr. Tonkoff: Get this all in the record. The purpose of this answer is to discover Mr. Herman's

(Deposition of Horton Herman.)

view was of the \$10,000.00 that he expected to get and so conveyed for \$7,500.00.

Mr. Kester: My position is that the agreement speaks for itself; that any attempt to go beyond the agreement is irrelevant and immaterial. We do not deny that the agreement was made; we do not deny the legal effect of the agreement as it appears on the face.

Mr. Tonkoff: That isn't the purpose of this question. I will propound the question again. What was your estimated value of your service for defending Mr. Barr?

Mr. Kester: I will stand on my objection.

Mr. Tonkoff: Well, go ahead, we can still put it in the record.

Mr. Kester: I don't think it is necessary in that kind of question.

Mr. Tonkoff: Are you going to pass on it or the Court going to pass?

Mr. Kester: I told you if want a ruling; you know how to get the ruling.

Mr. Tonkoff: All right, we will get a ruling from this Federal Court if you want to stay here until next week.

Mr. Kester: Do whatever you like. This Federal Court in this district wouldn't have any jurisdiction over it anyway.

Q. By Mr. Tonkoff: You refuse to answer that question?

A. Well, what was the question — What my estimate of my value——?

(Deposition of Horton Herman.)

Q. What would have been your charge on this value had you not gone in and put in your fees on this wheat crop which was owned by your client?

A. I don't know.

Q. You haven't the slightest idea?

A. I have an idea but I don't know what they would have been.

Q. Would they have been \$10,000.00?

A. No.

Q. They wouldn't have been?

A. No. I was taking a gamble the same as you were on the crop coming in.

Q. I wasn't taking any gamble because it was estimated by Mr. Barr, was it not?

Mr. Kester: Now, just a minute. That is a leading question; it is argumentative and Mr. Tonkoff is not the witness. And if you want to testify we will put you under oath.

Mr. Tonkoff: I will be there, too. Put it all in the record.

Q. Was any statement made as to the value of that crop by Mr. Barr?

A. No, in my recollection, no. If you will recall, Mr. Tonkoff, that you and Mr. Ennis worked out or—I don't know whether Bill Holst came up or not—but you worked out substantially all of the details of the assignment and the declaration of trust, and I wasn't even present at nine-tenths of it.

Q. What was the purpose in re-assigning the

(Deposition of Horton Herman.)

crop then to Mr. Barr in accordance with that agreement after we were paid off the \$72,500.00, do you know? Did we have any discussion concerning that matter?

A. Well, I don't know, Mr. Tonkoff. I didn't think that I was a party to the case. You appear to be laying the ground work to bring such an action against me as a Trustee. But in any event—

Q. I am not bringing you any action—any action against you and I want to advise you. And I think you know me well enough by now what my reputation is. I am not laying any ground for bringing any suit against you whatever. We had a release and that was the end—good, bad or indifferent. I am merely asking you questions, Mr. Herman, in order to represent these beneficiaries as I think they should be represented. That is the purpose of my questioning.

A. Uh-huh. What was the question?

Q. I can restate it. Was there a discussion concerning the purpose of reassigning this crop to Mr. Barr after the \$72,500.00 was paid up?

A. I related the conversation with Mr. Harvey Barr.

Mr. Tonkoff: Do you have some of the exhibits?

Mr. Kester: No, I do not.

Mr. Tonkoff: Where is the exhibit on the Declaration of Trust? Pardon me for interfering with you, Mr. Herman. Where is the Declaration of Trust?

(Deposition of Horton Herman.)

The Reporter: We have 13 exhibits; that is all I know.

Mr. Tonkoff: We have a Declaration of Trust here somewhere.

Mr. Kester: It is Exhibit 3.

Mr. Tonkoff: Here it is. No, this is the Assignment. There is a Declaration there. You don't have it?

Mr. Kester: No.

The Witness: Here it is.

Q. By Mr. Tonkoff: In this Exhibit 3 it is provided that we would reassign—you and I would reassign Mr. Clay Barr and his wife the crop after we had received the \$72,500.00.

A. That isn't my understanding of the agreement. My understanding was Clay Barr would assign to us those proportionate shares to do with what we wanted to do. They were our's. And, as a matter of fact, if you recall, I recorded that assignment. We agreed that that would be the thing to do—to show an outright assignment of a proportion of the crop. I had it recorded down there in the County.

Q. Well, did we have any discussion as to the value of the crop when we made a provision in Exhibit 3, and it says: "It is agreed that at the earliest practical date, not in any event to be later than November 15, 1953, said crop to be sold up to the extent of Seventy-two Thousand Five Hundred Dollars net to the Assignees; and the Assignees shall upon the receipt of said sum endorse and

(Deposition of Horton Herman.)

deliver over to the Assignors all warehouse receipts, if any, representing any of said crops not so sold.”? Did we have any discussion as the value of the crop when we made that provision?

A. I think there was some discussions as to values. Specifically I don't know. I remember this, that there is some question about whether or not it was barley or wheat or what type of a grain. And it was contemplated—I think you and I even talked about it—that if it went barley, that is, if the barley went for brewing purposes that the crop would be two or three-hundred thousand dollars. But we both realized and talked about it and that is why I think the 'phone call was made to satisfy that the water wasn't going to pour in there by your man, Welch, who lived down there.

Q. You say my man Welch lived down there?

A. He had lived there. That was my information.

Q. This conversation was in the presence of Mr. Barr, was it not?

A. That he lived down there?

Q. No. No, as to this crop would go into around a quarter of a million dollars?

A. No, I don't think so. I think you and I talked about it. You and I made the initial approach on this settlement. I talked to you at the Davenport Hotel and I said “I have got a client that I think is going crazy” or something to that effect. And I was of the opinion that you and I were in this to see if we realized the same as the clients.

(Deposition of Horton Herman.)

Q. Was there any reason, Mr. Herman, that we didn't take an assignment of the crop and call it quits—be satisfied with our settlement by taking the crop?

A. Why, yes, I think there was.

Q. What was the discussion?

A. I don't know. It appeared to me if the crop went over our agreement was to take less.

Q. If the crop went over this \$72,500.00?

A. That we were to take only the \$72,500.00. That was the maximum. If it went less we agreed to take less.

Q. Was there any doubt at that time as to what the crop would bring except as to controls, if the controls were out?

A. You are talking—Yes, of course, there is always doubt with a crop, and you know it.

Q. I am talking about the discussion we had?

A. Yes, there was lots of doubt. And you know it as well as I do.

Q. Just state what the discussion was?

A. Whether or not the water would flood that all out; whether or not there is all sorts of things that can happen to a crop. We even provided in there, as I recall, that there was no guarantee as to the yield. That was my recollection.

Q. Provide that there was no guarantee as to the yield? A. Yes.

Q. Would you find that in that document?

A. What exhibit—have you got the exhibit?

Q. Yes, Exhibit 3.

(Deposition of Horton Herman.)

A. On page 2 it says "It is understood and agreed that the assignors are not guaranteeing any particular yield." There were matters discussed. I think Welch wanted to go down there right away and look it over.

Q. And there was some mention, wasn't there, in our conversation at your office while we were drawing this agreement as to the amount that this 2800 acres would produce in dollars and cents?

A. No. No. The thing that I remember is this discussion about brewing barley and if it goes to brewing barley—I didn't even know that there was such a difference between ordinary barley and brewing barley, something like 3 or 4-dollars a ton as distinguished from—. Well, that wouldn't be right either. But four or five times greater value whether it would be brewing barley would constitute it. I don't know.

Q. You mentioned awhile ago I had made complaint to you about the failure to spray and failure to irrigate?

A. No, I said that I didn't recall what specifically you complained about but I thought it was one of those two.

Q. Do you remember me complaining to you about him having plowed up some of the grain?

A. No.

Q. Did you know that some of the grain was plowed up? A. No.

Q. Did you know that most of the grain was dry on this area?

(Deposition of Horton Herman.)

A. Well, I know this, Mr. Tonkoff—

Q. No—Did you know that, Mr. Herman? It is simple; you either did or you didn't.

A. I hadn't been down there; you had been down there. There was no occasion to me—The only thing that I recall that you ever told me was wrong in your opinion was either that the weeds hadn't been sprayed or that there was too much or too little water. Now that is my only recollection. And I remember saying this to you, Mr. Tonkoff,—something to the effect "Spray has to be put on in a very delicate stage in the Palouse country with which I am familiar". And I said "I can't believe that the failure to put on spray seasonably right at the boot stage or just before the boot stage in a grain is in anyway a reflection on a farmer".

Q. How did you know about how—about the grains and what—so forth down there, Mr. Herman, on the ranch? You had never been on it.

A. Well, prior to entering into the settlement there was some discussion as to whether or not there would be a crop on there, that you participated in. And you satisfied yourself having Welch call down there that there would be a crop on it.

Q. And didn't—And after Mr. Welch made a 'phone call in the course of this drawing of this agreement, prior to the time that it was drawn he did call down there, and the information that he received was that there was an excellent crop?

A. I don't know. You told me. You are the only source of information that I have from Mr. Welch.

(Deposition of Horton Herman.)

Q. Did you rely on me on the execution of this agreement and the declaration of trust and the \$10,000.00 that you were to receive? Did you solely rely on me—my information?

A. In what regard?

Q. As to the condition of the crop at that time?

A. Mr. Barr told me that there was a possibility of the water flooding it out and I was willing to take a chance for that kind of money that the water would not wash the crop out.

Q. And as far as you know the water didn't wash the crop out, did it? A. No.

Q. Well, now, this conversation was in the presence of Mr. Barr? A. Which conversation?

Q. Concerning the condition of the crop on June 10th of 1953?

A. I don't think so. I think it was just you and I.

Q. Do you recollect having any conversation up at the court house—at the elevator—in the presence of Mr. Barr, Mr. Welch, after Mr. Welch had made the call to Dorris, California?

A. No, I don't. My recollection is that—I don't say that there wasn't any such conversation, but I don't have any recollection of any substance like that.

Q. Where did we finally make up our minds to enter into this Declaration? Was it in your office or at the court house after the 'phone call was made?

(Deposition of Horton Herman.)

A. I don't recall that.

Q. You don't recall? A. No.

Q. At any rate did we have any information concerning the condition of the crop before we executed the Assignment and Declaration of Trust?

A. I understood you did.

Q. Did you rely on my information furnished you?

A. In part. In part, yes, because I was personally interested in the thing, having spent several weeks getting ready for trial and two or three days in trial. I wanted to have the same chance you did and the rest—of being paid for our work.

Q. Well, did your reliance on my word ever cease as to the condition of the crop down there?

A. No. As far as what was told me at the time I believed it to be true and that was that we had a good chance that this crop would come through and that we all would be paid.

Q. Do you know why the crop wasn't successful?

A. No, I have only the two things that you have suggested to me as being the reason why and I don't know which of those that you—

Q. Did Mr. Barr give you any reasons why the crop didn't amount to more than it did?

A. No.

Q. He has never referred to you—

A. No.

Q. —never made any statement to you—

A. No.

(Deposition of Horton Herman.)

Q. —why it didn't bring more than it did?

A. Well, I think that some statement was made about—I have this recollection, I don't know where it comes from, that there was a condition of frost in that area or cold weather, which is related of course to irrigating. I mean you could—I assume, I don't know anything about irrigation, but I assume that you could destroy a crop by irrigating or putting water on it when it was too cold. Now, I don't have any—something else may have been said but I don't—.

Q. When did you obtain that information about the crop being a failure due to the freezing?

A. I don't know that that was the thing—being a failure due to freezing. I don't know if it was a failure. And if it was a failure I don't know the cause.

Q. Mr. Herman, you have consulted with opposing counsel before the taking of this deposition?

A. They came in at ten minutes to eleven when this deposition was set for eleven o'clock, that is right.

Q. Did you have any discussion concerning your testimony? A. Yes, we did.

Q. Did you receive any correspondence or—

A. None.

Q. —or telephone correspondence?

A. No, with either the client of Mr.—I don't even know how to pronounce the gentleman's name.

Mr. Kester: It is Kester.

The Witness: Kester, no.

(Deposition of Horton Herman.)

Q. By Mr. Tonkoff: You have had no correspondence or conversation or communication of any kind with Mr. Barr? A. Not in a year.

Mr. Tonkoff: That is all.

Direct Examination

Q. By Mr. Kester: Mr. Herman, there has been marked for identification a letter which I believe is Exhibit 13 which you wrote to a number of people—Welch, Charpentier, Cramer—and more or less everybody concerned with this; you recall that letter, do you? A. Yes, I do.

Q. At the time that was written did that letter state your views with respect to your position as a Trustee in this matter?

A. My recollection is that it does.

Q. It is on the top of that file.

A. It may not state it too well but substantially it did. I felt that the moneys ought to be disbursed and that if Mr. Clay Barr was guilty of any breach of the contract that he should be sued for it and respond in damages if he had. I don't know whether I——

Q. Do you have available the file which relates to the first case that Mr. Tonkoff brought in the District of Oregon, No. 7268, the one in which he names you as a defendant and subsequently you filed a motion in that case based on an affidavit? Do you happen to have that before you?

A. Well, I have all the papers. If you could give me some idea——?

(Deposition of Horton Herman.)

Q. Yes. Your motion which was filed in January of '54?

A. Now, wait a minute——

Q. Perhaps I can refresh your recollection with my file copy. In case No. 7268 you filed a motion supported by an affidavit, and I would like to direct your attention to the latter portion of the affidavit, paragraph 8. I won't attempt to make this copy a part of the record because the original is available to the court in the original file of the court. In that portion of the affidavit you said in substance that you had no knowledge as to the merits of the case stated by Mr. Tonkoff but if there was a case that it should be brought by the individual beneficiaries and not by the Trustees. Is that a fair summary of that portion?

A. Yes, it is.

Q. Was that your view at that time?

A. Yes.

Q. And is that still your view with respect to the administration of this Trust? A. Yes.

Q. Now, this letter of December 12, 1953, which stated your view at that time——

A. What was the date of that affidavit?

Q. The affidavit was January 12, 1954. This letter of December 12, 1953, that has been referred to as Exhibit 13, does that still state your views with respect to how this Trust should have been administered? A. That is Exhibit 13?

Q. Yes.

(Deposition of Horton Herman.)

Mr. Tonkoff: Objection is reserved by both sides as I understand?

Mr. Kester: Yes.

The Witness: That is substantially—substantially sets forth what I did believe at that time and I still have that view.

Q. By Mr. Kester:: And is it not a fact that the only reason the Trust has not been administered in accordance with its terms and disbursed and the matters concluded as far as the Trust is concerned, the only reason that that has not happened is because of the claims made by Mr. Tonkoff and the bringing of these suits by Mr. Tonkoff?

A. Well, as far as I know. My position regarding the distribution is set out in this letter of December 12th and I think it should have been done. And that any suit for breach of contract certainly would be in the beneficiaries. And I have no knowledge of any other reason; if there is any other reason I don't know about it.

Q. Well, at the time you submitted your resignation as a Trustee which I believe is document marked Exhibit 12, did you then have the consent of Harvey Barr to resign as Trustee?

A. No.

Q. Did not Harvey Barr in fact object to your resigning as Trustee? A. Yes, he did.

Q. And did he not make that known by letter directed to you? A. Yes, he did.

Q. Do you have that letter available?

(Deposition of Horton Herman.)

A. I think so. I have got a letter that I mailed to him, Mr. Harvey S. Barr.

Q. And that is dated what?

A. Here it is. Here is the letter from Harvey S. Barr.

Mr. Kester: Would you mark these two letters, please? First the letter of January 26, 1954 and then the letter of February 5, 1954? First one will be marked Defendants' Exhibit No. 14 and the next will be Defendants' Exhibit No. 15, both for Identification.

(The instruments referred to were handed the Reporter and marked respectively Defendants' Exhibits Nos. 14 and 15, Witness Herman.)

Q. By Mr. Kester: Now, at the time you tendered this resignation and Harvey Barr objected to it, Harvey Barr was then a beneficiary of the trust, was he not?

A. Under my assignment, which is one of the exhibits, I believe, here. As far as I was concerned he had all the right, title and interest that I had.

Q. As beneficiaries?

A. As beneficiaries.

Q. Now, there was some conversation or some testimony earlier about Mr. Tonkoff also assigning his beneficial interest under the trust to Harvey Barr. Could you tell us whether that was done?

Mr. Tonkoff: The assignment speaks for itself and it is objected to.

(Deposition of Horton Herman.)

Q. By Mr. Kester: Do you have the assignment here?

A. Yes, I have an assignment. Mr. Tonkoff and I both signed the same instrument or a duplicate of the same instrument. But his was never carried out apparently.

Q. You have shown us a document bearing Mr. Tonkoff's signature, dated July 10th, 1953. That is what you refer to? A. Yes.

Mr. Kester: Would you mark that also.

(The instrument handed the Reporter was marked for Identification as Defendants' Exhibit No. 16, Witness Herman.)

Q. By Mr. Kester: You say his was not carried out. What do you mean by that?

A. I don't have any personal knowledge of that because all I know is, I think Mr. Tonkoff told me that Mr. Barr came down to Yakima to see him or something of that kind; that he talked with him anyway, and anything else that I would know about would be what Mr. Ennis told me. I was gone from the time from about July 9th. I was at a legal or law science institute in San Francisco.

Q. There was produced here I believe from your file—No, it was from Mr. Tonkoff's file a copy of the complaint in the action that was settled with this assignment. Do you happen to have a copy of the answer or any other pleadings that were in that case?

A. I think there were separate answers of the separate defendants.

Deposition of Horton Herman.)

Q. You were representing merely the Barrs?

A. Yes. What is that—an amended answer to an amended complaint? I don't know—I assume that is what the case went to trial on but I don't have any independent recollection.

Q. I am not familiar with your procedure here in Washington but I notice this starts out as a Sixth Affirmative Defense, would this be supplemental to some other answer?

A. It would if that was what it says. There is a reply. And here is an answer to amended complaint. Well, this yellow copy, answer to amended complaint, appears to have something written in pencil on page 4. So I don't know if that is one in which the case went to trial or not. Here is some sort of an answer of Sterling Higgins. It seems to me that these pleadings were finally determined before the court—time to try the case. That is all in this file.

Q. May we have these from your file also?

A. Yes.

Mr. Kester: Will you mark these? The Answer to Amended Complaint by defendant Sterling Higgins will be 17 and the Answer to Amended Complaint by defendant Clay Barr will be 18 and the Amended Answer by Clay Barr would be 19.

(The instruments handed the Reporter were marked for Identification as Defendants' Exhibits 17, 18 and 19 respectively, Witness Herman.)

(Deposition of Horton Herman.)

Mr. Kester: I will state to the record that in identifying these other pleadings in the original case I do so without waiving our objection to the complaint. If it may be offered on the grounds that the entire transaction is irrelevant and immaterial having been merged in the settlement agreement but merely so that the allegations of that complaint will not go unchallenged.

Q. Now, Mr. Herman, I take it that as a co-trustee under this original Declaration of Trust you, in the exercise of your discretion as a Trustee chose not to bring or join in the bringing of this action that Mr. Tonkoff brought, is that correct?

A. I decided, yes, to take no action one way or the other unless I was forced to.

Q. And, as you have stated, the principal reasons for that were, first, that you did not want to subject the Trustee to the expense of litigation and possible expenses of an inter-pleader?

A. That is right.

Q. And, second, that you felt if there was an claim that it was by the beneficiaries individually and that under the Trustee you would assume an affirmative position to sue or anything else except to pay over money?

A. My interpretation of the Trustee Agreement was we were to disburse the money while it was available.

Q. Were there any other reasons except those I have mentioned of a major nature?

A. No.

Deposition of Horton Herman.)

Mr. Kester: I think that is all.

Mr. Tonkoff: Just a couple of questions.

Recross Examination

Q. By Mr. Tonkoff: Exhibit 15 is the letter you received from Mr. Harvey Barr?

A. That is right, yes.

Q. And you say you are acquainted with Mr. Harvey Barr? A. Yes.

Q. And do you know who dictated this letter?

A. No.

Q. You haven't the slightest idea?

A. Not the slightest idea.

Q. It came dated February 5th after you had informed him of your resignation which is dated January 26, 1954?

A. That is right. I don't recall whether or not he was advised preliminary to that letter or my letter of January 26, 1954 that—

Q. I see.

A. Well, I could probably tell by reading the letter whether or not I advised him prior to that time. I don't know that I told him about it before this letter of January 26 because I had made up my mind that in view of all the circumstances that I was going to resign whether he insisted that I say or not.

Q. Why had you made up your mind to resign?

A. Well, I didn't want to put you through the trouble of suing me to get rid of me and I felt that the court would probably permit you on the ter-

(Deposition of Horton Herman.)

mination of the suit to do whatever you felt you had to do anyway.

Q. Did you file the affidavit in the first case in the Federal Court in Portland on account of Mr. Barr objecting to your resignation? A. No.

Q. You did that on your own?

A. Well, yes. You had made all kind of threats and accusations around here to me and I felt that I should put what I felt was my interpretation of the whole thing in an affidavit and file it.

Q. The threats and accusations were made after you had filed the affidavit in Portland, weren't they?

A. Well, I don't know what the time is of the filing. I don't know.

Q. Don't you have a recollection that that is what brought on the dispute and controversy between you and myself due to the fact that you had filed the affidavit in the first cause of action or in the first action that you filed in Portland?

A. Well, you first wanted me to join—I don't recall distinctly but as I recall you wanted me to join and I gave you the views that have been set out here and then you said "Well, I will name you a party defendant anyway". And I said "If you feel you must, go ahead and do it". And then some jurisdictional point was raised and you took the position that Judge Fee was wrong but none the less he was the Judge in the case. And my recollection is that the case was dismissed and then you blamed me for it and you came around making a

(Deposition of Horton Herman.)

bunch of accusations and I said "Rather than submit you to the difficulty", I said, "if you will get your people to demand my release and you demand it as a beneficiary why I will resign".

Q. And that was done, wasn't it?

A. That is right.

Mr. Tonkoff: I think that is all.

Mr. Kester: That is all that I have.

Mr. Tonkoff: Do you want Mr. Herman to sign this?

The Witness: I think I will read it and sign it.

Mr. Tonkoff: Can you do that in the next week or so?

(No response.)

(Whereupon, at 12:40 p.m., the taking of the deposition of Horton Herman was concluded.)

Notary Public's certificate attached.

[Title of District Court and Cause.]

DEPOSITIONS OF CLARENCE F. ENLOE
MARY E. NOAKES, JAMES H. NOAKES,
J. R. RATLIFF, JR.

It Is Hereby Stipulated by and between J. P. Tonkoff, of attorneys for plaintiff, and Randall B. Kester, of attorneys for defendants, that the depositions of Clarence F. Enloe, Mary E. Noakes, James H. Noakes and John Richard Ratliff, Jr., named in the Notice of Taking Depositions which

was served on opposing counsel on the 26th day of September, 1955, will be taken on October 7, 1955, at 203 Pine Tree Building, Klamath Falls, Oregon, before Vera L. Chase, a Notary Public and court reporter, after which testimony has been given the depositions will be reduced to writing and the original filed with the United States District Court for the District of Oregon, Portland, Oregon; that all objections are waived until the time of trial except as to the form of the question, and that either party may use said depositions at the time of trial subject to the Rules of Civil Procedure. In the event any documents are identified in connection with the testimony of any witness that the originals may be returned to the party identifying them after the Court Reporter has made photostat copies to be attached. It Being Further Stipulated that the signatures of the witnesses to said depositions be waived.

Appearances: J. P. Tonkoff, of Tonkoff, Holst & Hopp, attorneys for plaintiff, and Randall B. Kester, of Maguire, Shields, Morrison & Bailey, attorneys for defendants; and present, Clay Barr.

Whereupon the following proceedings were had:

CLARENCE F. ENLOE

a witness produced on behalf of the plaintiff, was examined and testified as follows in answer to questions put to him by the respective attorneys:

J. P. Tonkoff: Would you state your full name?

A. Clarence F. Enloe.

Q. Where do you reside?

A. Dorris, California.

(Deposition of Clarence F. Enloe.)

Q. How long have you lived in Dorris?

A. Oh, about 15 years.

Q. What is your occupation?

A. Well driller.

Q. Do you have any other occupation?

A. Farming once in a while.

Q. How long have you farmed in the area of Dorris, California? A. About 8 years.

Q. What kind of farming did you do?

A. General farming.

Q. Did that include grain? A. Yes.

Q. Are you familiar with a ranch commonly known as the Meiss Ranch? A. Yes.

Q. And have you had occasion to be on that ranch in the past? A. Yes.

Q. Did you happen to be on that ranch during the first part of July, 1953? A. Yes.

Q. Did you observe what crops were then growing there? A. I did.

Q. What did you observe?

A. Grain and potatoes.

Q. Could you briefly describe where that ranch is and what the general terrain is there?

A. It would be on the west side of Butte Valley.

Q. And is there any body of water on that ranch? A. Yes.

Q. What side of the ranch is that body of water on?

A. It would be on the easterly side.

Q. And do you know whether or not the water level is above or below the terrain of the ranch?

(Deposition of Clarence F. Enloe.)

A. It would be above part of it and below some of it.

Q. Going back to the time you observed the crops in the month of July, 1953, would you state what the condition of the soil was concerning moisture?

A. Very dry.

Q. Did you see anything on the ground that would indicate how dry it was?

A. There were cracks in the ground.

Q. About how wide? A. Oh, 3 inches.

Q. How long in length were the cracks?

A. Varied, irregular.

Q. On what portions of the property did you see these cracks?

A. Well, it would be near the spud field. I don't know.

Q. Would that be the north side?

A. It would be on the west side.

Q. Over what acreage did you happen to observe this condition of the soil?

A. I didn't walk around it, but I imagine 100 acres or more.

Q. Is that all the property you saw?

A. That's the part of noticed the cracks in, I didn't pay any particular attention to the rest of it. It was obvious.

Q. What was grown on that area?

A. Wheat.

Q. Did you inspect any of the barley, rye or oats?

(Deposition of Clarence F. Enloe.)

A. No, I didn't pay much attention to *that*.

Q. And the only portion of the crops you observed where you saw the cracked ground was the wheat field?

A. Yes.

Q. Have you farmed any land in the immediate vicinity of this ranch?

A. In the upper end of the valley.

Q. About how far would that be away?

A. 11 or 12 miles.

Q. Are the climatic conditions the same?

A. Approximately the same.

Q. Do you know what type of soil the ranch consists of?

A. Lake bottom.

Q. Is that rich or poor soil?

A. Rich.

Q. Can you,—is it necessary to irrigate?

A. Very much.

Q. Can you grow a crop without irrigation?

A. Not a very good one.

Q. And were you familiar with the season of 1953?

A. Yes.

Q. Would you tell us what kind of a growing season it was?

A. It was a very good growing season.

Q. When were the crops ready for harvest,—when was the harvest season begun in 1953?

A. In the month of August.

Q. What part of August?

A. Oh, from—any time after the 10th.

Q. And, Mr. Enloe, are you familiar with the production under favorable farming conditions, and

(Deposition of Clarence F. Enloe.)

particularly the conditions that existed concerning wheat and climatic conditions in 1953?

Mr. Kester: Of what.

Mr. Tonkoff: Grain crops.

Mr. Kester: On what ground?

Mr. Tonkoff: On the Meiss Ranch and the immediate vicinity.

A. Depends on what you were growing.

Q. Generally with all crops, but I will ask you in detail. The question is, are you familiar with the production on this property? A. Yes.

Q. Under conditions such as 1953, and on the land you know there on that Meiss Ranch and vicinity, could you tell us about what production you would get in wheat?

Mr. Kester: Just a minute. I am going to object to that. There is no foundation laid to qualify for an expert opinion.

Mr. Tonkoff: Have you raised wheat, barley, rye and oats in this vicinity? A. Yes.

Q. And in the immediate vicinity of the Meiss Ranch? A. Within 10 or 11 miles.

Q. Are the climatic conditions the same?

A. Yes.

Q. Is the soil the same? A. No.

Q. What is different?

A. The Meiss Ranch is better soil.

Q. And by your experience in raising grain crops, do you know what the production on the Meiss Ranch is under favorable weather conditions?

A. Approximately.

(Deposition of Clarence F. Enloe.)

Q. What would you say the production of wheat would be on that land, if properly irrigated?

A. 2500 pounds, or better.

Q. And what would oats,—is that per acre?

A. Yes.

Q. What would oats produce per acre under like conditions? A. 2000, approximately.

Q. What would rye produce?

A. From 1200 pounds on up.

Q. Did I ask you about barley? A. No.

Q. What would be the barley production?

A. 3000 pounds or better.

Q. Did you have occasion to go on the east side of the ranch and west of the lake there?

A. East side?

Q. West of the lake and east of the ranch.

A. Well, I was out there several times.

Q. While you were out there did you notice the condition of the crop, concerning weeds?

A. Just this one field.

Q. How many acres did that consist of?

A. I really don't know, about a couple of hundred acres, or possibly more.

Q. Would you describe the condition of the crop where the weeds were?

A. I didn't pay too much attention, there was a lot of weeds.

Q. Could it be harvested under the conditions?

A. I don't think so.

Q. Do you know whether that area was harvested? A. I don't know.

(Deposition of Clarence F. Enloe.)

Q. What do you do for weeds when you observe they are coming up through the grain?

A. I spray for them.

Q. Is that a practice among the grain growers here? A. Common practice.

Q. How long has that practice been in existence?

A. I don't know, quite a long while.

Q. Do you know whether or not this area was sprayed, of your own knowledge?

A. I don't know.

Q. I omitted to ask you, Mr. Enloe, what was the size or height of the crop where you saw the dry land where it was cracked?

A. Approximately, oh, 8 or 10 inches.

Q. Have you observed crops growing in that area prior to this time when the ground wasn't dry?

A. Yes.

Q. At the same time of year have you observed crops, and in other years during the same period of time? A. Yes.

Q. How high were they?

A. Waist high.

Q. In your opinion, and experience as a grain grower, would you say the crop was cultivated and grown in a good farmerlike manner, consistent with the standards in this vicinity? A. No.

Mr. Kester: I want to enter an objection, there is no qualification shown, and second it calls for a conclusion, and is not a proper subject for expert testimony.

(Deposition of Clarence F. Enloe.)

Mr. Tonkoff: Will you read the question?

(The reporter read the question, beginning on the third line above.)

Q. Now, during or just prior to harvest, do you have any difficulty with geese and ducks taking any of the crops? A. In that vicinity, yes.

Q. Particularly, does that condition exist in the vicinity of the Meiss Ranch?

A. Yes. I wasn't there at that time.

Q. I wasn't asking your observation but just generally is there any danger of the ducks and geese getting the crops? A. Yes.

Q. Is there any reason why the Meiss Ranch is more subject to that trouble than any other place? Has the water got anything to do with it?

A. Yes, I believe it would have.

Q. One more question, when you observed this dry area did you observe whether or not there was water in the lake? A. Yes.

Q. Was there any water available for irrigation?

Mr. Kester: I will object to that. There is no showing made of his knowledge whether water might have been available.

Q. How full was the lake? A. Very full.

Q. There was some of that lake above the terrain of the ranch? A. I think so.

Q. Was there an abundance of water to irrigate that property? A. Yes.

Mr. Tonkoff: That's all.

(Deposition of Clarence F. Enloe.)

Cross Examination

By Mr. Kester:

Q. Mr. Enloe, just when was it you were on the ranch in 1953?

A. From February until the latter part of July.

Q. All that time?

A. I was drilling some wells there.

Q. Where were you drilling wells?

A. I was drilling wells to get rid of the surplus of water, repairing wells.

Q. Whereabouts were you drilling wells?

A. On the east side.

Q. The east side of the ranch, east of the lake?

A. Yes.

Q. That's quite a distance from the cultivated part, is it not? A. Yes.

Q. Clear across the lake? A. Yes.

Q. From the area where you were drilling the wells, you can't even see the crops?

A. I drilled on the west side, also.

Q. The west side of the lake or the ranch?

A. Ranch. On the tillable part.

Q. On the west side. What was growing where you were drilling wells?

A. Grain, potatoes.

Q. You were drilling wells in the potato area?

A. Not right in the potato patch, on the edge.

Q. And your concern merely was to drill wells?

A. That's right.

(Deposition of Clarence F. Enloe.)

Q. You had nothing to do with the farming part of the ranch? A. No.

Q. By whom were you hired?

A. Mr. Stevenson.

Q. Bud Stevenson? A. Yes.

Q. When did he hire you?

A. In February.

Q. Did you start to work immediately?

A. Yes.

Q. You say you were in there about how long?

A. Until the latter part of July.

Q. Could you give us an approximate date a little closer than that?

A. It might have run up into August, I don't remember exactly.

Q. The wells were for drainage, were they?

A. Some for drainage, some for irrigation.

Q. The drainage was necessary because there was too much water in certain areas?

A. That's right.

Q. And too much water is very damaging to grain crops. In fact, if it touches the stem it will damage the crop?

A. No, I don't think so.

Q. If grain stands in water it will damage the crop, so it is important to get the water off, isn't it?

A. If it stands very long.

Q. The wells you were drilling for irrigation purposes, where were they?

A. Northeast, one, and one,—let's see, in the northeast section, and it would be west and south of

(Deposition of Clarence F. Enloe.)

the lake, not very much south, more west than south.

Q. You mean around the ranch houses?

A. Yes.

Q. And you spoke about there being a lot of water in the lake at that time. What was the need for wells if there was water in the lake?

A. Their future program.

Q. As a matter of fact, the water in the lake has such high alkaline content it is not suitable for irrigation, is it?

A. That I don't know.

Q. So when you said there was a lot of water for irrigation you were not taking into account the quality?

A. No.

Q. You have never seen any tests?

A. Its been used, I know that.

Q. But you have no personal knowledge whether it is suitable?

A. No.

Q. Now, referring to the area on the west side you said was dry, is that what is normally referred to as dobe?

A. No, this was out in the deep soil.

Q. Was it area that was in crops or pasture?

A. Crops.

Q. Growing wheat, I think you said.

A. Yes.

Q. And that area is higher than the bottom land where the oats and potatoes were growing, isn't it?

A. Possibly some of it in, and some of it is on the level.

(Deposition of Clarence F. Enloe.)

Q. Isn't it up around the edge of this former lake bed?

A. It would be right on the edge, I imagine.

Q. At the time you—were you working over on that area on the west side?

A. Right south of the potato field, a little bit west of that wheat field.

Q. You were south of the potato field, as I understand it.

A. Yes. A little west, not much.

Q. The area you spoke of that was dry was northwest of the potatoes, wasn't it?

A. West.

Q. Straight west? But a distance of nearly a mile from where you were drilling wells, wasn't it?

A. Approximately.

Q. Did you notice in this wheat ground you say was cracked whether there had been any levelling done for the purpose of irrigation, were there any ditches?

A. Mr. Stevenson had pumped water up there several times. That's how come I was out in the field. I don't know where the water was going.

Q. Were you working on the pump?

A. No.

Q. What was the purpose of your trip?

A. Just riding along.

Q. And at that time they were pumping water on that same area?

A. I don't know where it was going, but it was going out of a ditch into a higher ditch.

(Deposition of Clarence F. Enloe.)

Q. You didn't see where the water was coming out on the ground? A. No.

Q. So you don't know whether that was even the same area where the wheat was growing?

A. It was the same area north of the potato field and grain field.

Q. Northwest of the potatoes? A. Yes.

Q. The area you saw you say was cracked, had that ground been leveled for irrigation?

A. I don't know whether it had been leveled or not, but it was bottom land, it was level.

Q. You say it was level? A. Yes.

Q. Were there any ditches there for irrigation purposes? A. Yes.

Q. Just when was it you made this trip and this observation you spoke of?

A. Fore part of July.

Q. And your testimony about the ground being dry and cracked is based upon this one trip with Mr. Stevenson? A. Yes.

Q. That's the only time you observed that condition?

A. No, I was there several times. I didn't pay any attention to it except it was rather obvious. I had no interest in it, I didn't pay any particular attention, anybody would notice that.

Q. Was that a subject of conversation between you and Mr. Stevenson? A. Later on.

Q. At the time you observed it? A. Yes.

Q. What was said?

(Deposition of Clarence F. Enloe.)

A. Oh, I don't remember the exact words. I asked him how come, I imagine.

Q. You are just guessing now, you don't actually recall what was said?

A. I wouldn't know the exact words. You would naturally make some comment on it, it would be the natural thing to do. What actually was said, or what he answered, I couldn't tell you.

Q. Did Mr. Stevenson say anything about what he was pumping water on, even though you couldn't see it? A. I don't remember exactly.

Q. What was the purpose of the trip, look at the pump?

A. Just riding around to see the potato crop, naturally we had to go through this grain field, that's where the road went.

Q. You were just making a little sight seeing trip, then? A. Yes.

Q. But didn't Stevenson say what the purpose of the trip was?

A. He didn't say nothing. Just going out there and start up the pump, that was all.

Q. You say you observed that area on other occasions. Can you identify those occasions, the time, or what you were doing?

A. Well, I made quite a number of trips out through there, looking the crops over, once in a while ride over with him to start the pumps, pump out the drain ditch into the lake, various things,—riding around.

(Deposition of Clarence F. Enloe.)

Q. But this observation testimony now is based primarily on this one trip you went to start the pump that you spoke of? A. Yes.

Q. The question of when to irrigate and how much to irrigate involves the exercise of judgment of the farmer operating the place, doesn't it?

A. I didn't hear you.

Q. The question of when to irrigate and how much to irrigate involves the exercise of judgment on the part of the farmer making the decision, doesn't it? A. That's right.

Q. He takes into account the season, the condition of the ground, the soil? A. Yes.

Q. And isn't it a fact if you irrigate late in the season you will get a regrowth? A. Yes.

Q. And delay the harvest? A. Yes.

Q. And if there is an early frost, you take a chance of getting caught by frost? A. Yes.

Q. And the more delay in harvesting, the more chance of getting caught by the birds, isn't there?

A. Yes.

Q. Because most of the birds come in from the north in the fall, do they not? A. Yes.

Q. Likewise the question of spraying, and when, involved an exercise of judgment?

A. That's right.

Q. And it involves the particular growth of the grain? A. It should.

Q. If you spray too young you may kill the grain? A. No.

Q. Doesn't it sometimes happen by the time the

(Deposition of Clarence F. Enloe.)

grain is big enough to stand the spray, then the weeds are too big to be caught by the spray?

A. Say that again.

Q. Put it this way. Doesn't it sometimes happen that if the grain is big enough to withstand the spray, the weeds are too big to be killed by the spray?

A. That would be the content of your spray that would determine that.

Q. Then that's a question of judgment of the farmer to decide whether its safe to spray?

A. Yes.

Q. When these alkali weeds get big it takes an awful lot of spray?

A. When they get that big there's nothing but weeds.

Q. Wasn't that the condition down there, the weeds were so far ahead of the grain spraying wouldn't have done any good?

A. That's right.

Q. The only thing to do is plow it up for summer fallow?

A. That would be up to the farmer.

Q. Isn't it also true in that country unless the land is prepared in the fall you don't get as good a crop next year?

A. Not necessarily.

Q. Do you recall the weather in '53?

A. It was very good.

Q. It was a late wet spring, wasn't it?

A. That was one of the best years. I had a man working for me, dry land, the best year he had.

(Deposition of Clarence F. Enloe.)

Q. You are saying now this wasn't dry land farming, should have irrigated?

A. No. You understand I am not farming this place. You are farming it, I'm not farming it.

Q. Mr. Tonkoff is the one trying to make you farm it.

Mr. Tonkoff: All I ask from this man is what he saw.

Mr. Kester: You asked him to express expert opinions.

A. You are going into the farming.

Mr. Kester: Then what we get down to is this,—many of these questions involve so much judgment you wouldn't attempt to second guess the fellow running it?

A. Its general practice all over the valley. You can tell whether a fellow is farming like he should.

Q. Do you have any information as to when the operator could get into that ranch that spring?

A. No.

Q. Or what he found on that place?

A. No.

Q. Isn't it a fact in the spring it rained so much the machinery got bogged down in the mud?

A. Its possible.

Q. There was so much water in the lake there was a real hazard from the dike breaking and flooding the rest of the ranch with lake water?

A. That I don't know.

Q. Did you observe what the water level in the lake was in respect to the top of the dike?

(Deposition of Clarence F. Enloe.)

A. It was full.

Q. And a storm or high wind would have taken the water right over the dike in the early summer?

A. I don't know.

Q. The area you describe as being dry and cracked is about 100 acres?

A. Approximately. I didn't walk around it, just drove through it.

Q. And aside from that hundred acres, you didn't pay any particular attention to the rest of the ranch?

A. No, except this other field on the way to the pump.

Q. That was the weed patch?

A. Yes. I don't know how many acres in that.

Q. That was between the dike——

A. Between the lake and the potato patch.

Q. Have you ever seen any tests showing the nature of the soil on the Meiss Ranch?

A. No.

Q. You don't know anything about its alkaline content? A. No.

Q. When you say the Meiss Ranch had better soil than some other ranch, you don't really know the chemical content of the soil?

A. No, but I've seen some awful good crops on it.

Q. Isn't it a fact in lake bottom lands the alkali get more and more, so that it gets to be a real problem in years to come?

A. That depends upon the operator.

(Deposition of Clarence F. Enloe.)

Q. But alkali is something he has to contend with? A. Yes.

Q. That's one of the reasons you are trying to drain the land, it helps the alkali? A. Yes.

Q. You gave some estimates on the production of grain crops. What years were you referring to that that type of crops could be grown?

A. That particular year, and previous years. The average of the whole community.

Q. In '53 can you tell us what ranch raised 3000 pounds of barley per acre?

A. The ranch I used to have.

Q. Where is that?

A. In the north end of the valley.

Q. Is that what you are basing your estimate on for production of the Meiss Ranch?

A. Yes. The Meiss Ranch as a whole, the years I have known the Stevensons their production has been generally more.

Q. Was there ever a good grain crop on the area you describe as the weed patch?

A. No.

Q. You don't know that area has ever produced a grain crop?

A. I don't know if it was ever farmed or not.

Q. These estimates you have given of production, that's sort of an average of the area? You don't take into account particular fields?

A. I don't know whether that was the county average or not, but that's the average in that valley where they irrigate.

(Deposition of Clarence F. Enloe.)

Q. You don't take into account conditions in a particular field. That's the average of good, bad and indifferent, all lumped together, for instance?

A. Yes.

Q. For instance, on your own place you have fields where you don't get as much as other fields?

A. Yes.

Q. In that year you probably had a field that didn't produce as much.

A. Yes, but your good fields will go much higher than that.

Q. What I am getting at, its a general average of lumping the good and bad together?

A. Yes.

Q. You wouldn't expect to get a crop like that off the land next to the dike so full of weeds?

A. No.

Q. I think you said you started there in February, is that right? A. Yes.

Q. At the time you started the ranch was being managed by Bud Stevenson?

Mr. Tonkoff: Objected to as immaterial.

A. Yes.

Q. Do you recall about the middle of May the management of the ranch changed?

A. I don't know anything about it.

Mr. Kester: I think that's all.

Redirect Examination

By Mr. Tonkoff:

Q. Mr. Enloe, you say you were there from February until when?

(Deposition of Clarence F. Enloe.)

A. Latter part of July, or August.

Q. On how many occasions did you ever see Mr. Barr present on the ranch?

A. I saw him there once.

Q. When was that?

A. Let's see, at harvest time and one time before that, but I don't remember where it was. I believe in Klamath here.

Q. On the ranch did you see him more than once?

A. I might have, but I didn't see very much of Mr. Barr.

Q. Did you observe any of the crops along the ditch banks where they received ample moisture, the size of the crops? A. Yes.

Q. At what time, do you happen to remember?

A. It would be in July.

Q. What was the size of the crops around the ditch banks, the height of them?

A. Around waist height.

Q. Is that the same time you saw the ten inch wheat crop? A. Same time.

Recross Examination

By Mr. Kester:

Q. The wells you were drilling were for the use of the potato fields, were they not?

A. I don't know.

Q. Were any of them put into use while you were there? A. No.

(Deposition of Clarence F. Enloe.)

Q. You didn't finish your drilling in time to use them that season? A. No.

Mr. Kester: That's all.

Mr. Tonkoff: That's all.

MARY E. NOAKES

a witness produced on behalf of the plaintiff, was examined and testified as follows in answer to questions put to her by the respective attorneys:

Mr. Tonkoff: Mrs. Noakes, would you state your name? A. Mary E. Noakes.

Q. Where do you live?

A. Macdoel, California.

Q. How long have you lived there?

A. Eight years.

Q. What is your husband's occupation?

A. He works for the U. S. Forest Service.

Q. Had he any other occupation in the past?

A. Farming before.

Q. Are you familiar with the Meiss Ranch?

A. Yes.

Q. Showing you Identification 1, can you state whether or not you owned any property in the immediate area of the Meiss Ranch?

A. Yes, we did.

Q. This is the lake (indicating on the map). Where was your property?

A. Its in Sections 12 and 13, and half of Section 6.

Q. Was that west of the lake or east of the lake?

A. East of the lake, its right in there.

(Deposition of Mary E. Noakes.)

Q. Could you draw it in?

A. If I had a section mark I could.

Q. Just indicate it.

A. This is the canal (indicating on the map), and this is where our house set, and we had this and this half section here.

Q. Will you draw it in, just rough there?

A. I think that's right (drawing).

Q. Well, approximately. These two tracks I will mark them N-F, for Noakes Farm. How many acres does that consist of?

A. Approximately 800.

Q. How long did you farm it?

A. We farmed it eight years.

Q. Was that originally part of the Meiss Ranch?

A. Yes.

Q. What did you grow on that farm?

A. Alfalfa, clover, wheat, barley and potatoes, a little rye.

Q. Were you familiar with the growing conditions in 1953?

A. Yes, we ran the farm.

Q. What would you say the weather conditions were that year, good or bad?

A. They were good.

Q. Did you have any frost that season in the fall before the crops were harvested?

A. Not until September.

Q. When did the harvest season commence in the locality you farmed, when were the crops ready for harvest?

A. About the 20th of August.

(Deposition of Mary E. Noakes.)

Q. Are you familiar with the production per acre in that area? A. On our farm.

Q. Is the type of soil the same as on the Meiss Ranch?

A. No, the ground on the Meiss Ranch is better than our ground.

Q. What was the production of wheat in that vicinity?

Mr. Kester: You mean on her area?

Mr. Tonkoff: In the immediate vicinity.

A. We usually get about 3000 pounds per acre.

Q. Of wheat? A. Yes.

Q. Did you get that much that year?

A. On our good wheat we did.

Q. How much did you get on the other?

A. I would say about 25 sacks.

Q. How many pounds in a sack?

A. 120.

Q. Could you tell us what the barley production was that year per acre?

A. It usually runs about 11½ tons to the acre, and I imagine it was about the same as usual.

Q. And what was the rye?

A. About 15 sacks.

Q. How much does rye weigh a sack?

A. I mean about 1500 pounds.

Q. Per acre? A. Yes.

Q. And what were the oats?

A. We didn't have oats so I don't know.

Q. Did you have to irrigate this property?

A. Yes.

(Deposition of Mary E. Noakes.)

Q. In that area can you grow grain crops without irrigation? A. We never did.

Q. Do you know whether you could?

A. Some people have dry land, but they don't get the yield off of it.

Q. If you don't irrigate what happens?

A. It doesn't produce.

Q. When weeds appear in the crops in that area what do you do? A. Spray them.

Q. If you don't spray what happens?

A. The weeds choke out the grain.

Q. Is it customary to spray for weeds in this area? A. Yes.

Q. How long did you irrigate in '53 during the growing season?

A. As I remember we irrigated all of June and July, the first of August the pumps were turned off.

Q. Was any of the water in the lake available for irrigation?

A. We didn't use the lake, we weren't set up for that irrigation.

Q. Is that water in the lake used for irrigation?

A. Yes.

Q. By whom? A. My father.

Q. Who is your father?

A. J. C. Stevenson.

Q. Do you know when he acquired that property? A. Yes.

Q. When?

A. '42 or 3. It was 1943. He sold it the year before, in '52.

(Deposition of Mary E. Noakes.)

Q. During that time did you see grain crops growing on there? A. Sure.

Q. In good seasons and good crops, what height is the grain just before harvesting?

A. I have seen the rye, on my father's horse it would be as high as the saddle.

Q. This year, 1953, did you happen to go over to the ranch?

A. A couple of times to the ranch house.

Q. Were you there during the harvest time?

A. I was at the house but not in the field.

Q. When you went to the ranch did you notice anything on the road?

A. I saw grain scattered along the road.

Q. Can you tell us the extent, the amount of grain scattered on the road?

A. It was noticeable, but I couldn't say it was an inches only in one place, and that was where they had spilled some.

Q. How far did this spilling of grain extend from the ranch to the highway?

A. All along the road.

Q. How far is the main highway from the building where they loaded the grain?

A. About 5½ miles, I think.

Q. While on the ranch during the summer time did you happen to notice any weeds?

A. Just in one field.

Q. What was the size of that field in acres? Could you approximate it for us?

A. About 200 acres.

(Deposition of Mary E. Noakes.)

Mr. Tonkoff: I think that's all.

Cross Examination

By Mr. Kester:

Q. Mrs. Noakes, did you live on the Meiss Ranch with your father during all the time he was farming it? A. Yes, I did.

Q. You grew up on the place?

A. No, we acquired that after I was grown and married.

Q. And I suppose you were familiar in a general way with the methods your father used?

A. Yes.

Q. Did your father spray for weeds on that ranch?

A. Yes, he did, one time when they got the crops planted late.

Q. Only once then in all the years he sprayed for weeds, is that right? A. Yes.

Q. As I understand, the only place you noticed any sizeable amount of grain on the road was where by some sort of accident a quantity had been dumped out in one place?

A. No, along the edge of the road there was a lot of grain that fall, we all talked about it.

Q. Did you see it being hauled? A. Yes.

Q. They used the same trucks your father did?

A. Hauling part of it, yes.

Q. As I understand it, the place you folks owned in '53 was in 12 and 13, and part of Section 6?

A. That's right.

(Deposition of Mary E. Noakes.)

Q. And your place is set up to operate on a little different basis, on wells and ditch system?

A. Yes.

Q. And you pointed out the soil is somewhat different?

A. Its different from the particular part of the ranch where the lake part is.

Q. But the cultivated part is what is involved in this case, part of the lake bottom. A. Yes.

Q. And this patch of weeds you saw, was that immediately west of the dike?

A. Between two dikes, west of one dike.

Q. West of the big dike? A. Yes.

Q. And as I understand it, you didn't actually go out in the field any time that summer?

A. No.

Q. And all you could see was from the road the two times you went to the ranch house?

A. Yes.

Mr. Tonkoff: Mr. Noakes, would you be sworn?

JAMES H. NOAKES

a witness produced on behalf of the plaintiff, was examined and testified as follows in answer to questions put to him by the respective attorneys:

Mr. Tonkoff: Would you state your full name?

A. James H. Noakes.

Q. Where do you live? A. Macdoel.

Q. How long have you lived there?

A. Nine years, I think it is.

Q. What is your occupation?

(Deposition of James H. Noakes.)

A. Right now I am with the Forest Service.

Q. Have you any other occupation?

A. Farming.

Q. How long have you farmed?

A. About eight years.

Q. What kind of farming did you do?

A. What kind of farming? Diversified.

Q. Grow any grain? A. Yes.

Q. Showing you Identification 1, would you state whether that is about the approximate area of the ranch where it is marked N-F? A. Yes.

Q. How many acres does that consist of?

A. Approximately 800.

Q. What did you grow there?

A. We had potatoes, alfalfa, hay, grain.

Q. What kind of grain?

A. Wheat, barley, rye.

Q. Did you ever grow any oats there?

A. No.

Q. In '53, just what, about what was the weather in the growing season, good, bad or indifferent?

A. It was a good year.

Q. Did you have an early frost that year?

A. No, not that I remember.

Q. What does frost in the early fall do to the crops?

A. It just freezes the kernels so they shrivel up.

Q. Did you have frost early that year, '53?

A. I don't think we did out there.

Q. Is this property on the Meiss Ranch?

A. Yes.

(Deposition of James H. Noakes.)

Q. You had an option to purchase it?

A. Yes.

Q. Who did you secure that option from?

A. Frank Hoffus and Albert Kirschmer.

Q. Did you obtain that option after that ranch was sold to Mr. Kirschmer and Mr. Hoffus?

A. Yes.

Q. Are you familiar with the yield on that property in that vicinity?

A. Which property?

Q. The Meiss Ranch, your ranch, and all in the immediate area?

A. Well, some of the crops.

Q. Are you familiar with wheat? What is the production of wheat per acre, under good growing condition, and good farmer-like cultivation?

A. Well, a good crop of wheat sometimes will go a ton and a half to the acre. Barley about the same, I guess.

Q. And rye?

A. Well, rye, I would say around 1500 to 2000 pounds.

Q. Can you dry farm that property and raise any kind of a crop? A. No.

Q. Is irrigation necessary to produce good crops? A. Yes.

Q. What happens if a crop is not adequately irrigated? A. It just burns up.

Q. What do you do if weeds appear in the crop?

A. Well, usually they spray.

Q. Is that a custom in this area? A. Yes.

(Deposition of James H. Noakes.)

Q. And if you don't spray what effect do the weeds have on growing crops?

A. They just get ahead of the grain and choke it out.

Q. If the field is infested sufficiently will the weeds totally destroy the crop?

A. Yes, they will I guess if you let it go.

Q. Do you know whether or not the lake water was used for irrigation? A. Yes.

Q. Do you remember whether or not there was an abundance of water in '53?

A. Yes, there was.

Q. When does the harvesting season generally start under usual conditions?

A. Oh, around the middle of August.

Q. Did it start the middle of August in '53?

A. In '53?

Q. That was the year Mr. Barr was on the property.

A. Its about the same every year I guess.

Q. Did you have occasion to go out there during harvest time? A. No, I didn't.

Q. Did you observe any grain on the road leading up to the Meiss Ranch?

A. Yes, there was.

Q. Can you explain the extent of the amount of grain on the road?

A. I don't know how much there was, it was noticeable all right, how much there was would be kind of hard to tell.

(Deposition of James H. Noakes.)

Q. Was it more than usual in hauling grain from a ranch to the warehouse?

A. In one spot there was, where a tail gate or something had come open.

Q. How much grain was on the ground in that particular spot, can you describe it in inches?

A. Possibly an inch, something like that.

Q. Over what portion of the road did it extend?

A. Lengthwise, right in the middle of the road. I imagine a tail gate had come open, or something.

Q. You don't know of your own knowledge what happened?

A. No, I don't.

Q. Was grain noticeable from the Meiss Ranch to the highway?

A. There was a little grain along the edges of the road.

Q. How far is the Meiss Ranch from the highway?

A. The highway?

Q. The paved portion of the highway where you go into town.

A. Five, six miles, five and a half.

Q. Did you happen to be out on the ranch during harvest time?

A. No.

Q. Did you observe the ranch, concerning its conditions and weeds?

A. This one spot, one piece of ground was in weeds.

Q. Can you approximate how many acres?

A. Oh, 150, 200 acres, I would say.

Q. From what you observed could that be harvested?

A. No.

(Deposition of James H. Noakes.)

Q. Did you notice any of the property, whether or not it was plowed, if you remember?

Mr. Kester: Maybe you better tell him what time of year.

Mr. Tonkoff: Just before harvest, several weeks before harvest.

A. No, I wasn't up there very much.

Mr. Tonkoff: That's all.

Cross Examination

By Mr. Kester:

Q. Mr. Noakes, do you actually remember being on the Meiss Ranch at all that summer?

A. Not particularly, I don't know, I was by there on the road.

Q. Aside from just going on the road from the ranch, you weren't actually on the place at all?

A. No.

Q. The road to the ranch house goes along the southerly edge of the ranch? A. Yes.

Q. You can't see the larger part of the ranch from there? A. No.

Q. And the only part you actually noticed was this weed patch?

A. Yes. I guess that's half a mile off the road.

Q. And that's immediately west of the big dike?

A. Yes.

Q. With respect to the grain you saw on the ground, you would normally expect to find it where a tail gate or something came out?

(Deposition of James H. Noakes.)

A. As I remember, I didn't pay too much attention.

Q. And at that point it was possibly an inch deep? A. Yes.

Q. And over what length would that extend?

A. Oh, I don't know, maybe 100 yards from the gate.

Q. That was where they just left the ranch?

A. Yes.

Q. And they stopped after about a hundred yards? A. Yes.

Q. Aside from that there wasn't any more grain than you would normally expect to find from hauling operations?

A. There was quite a bit all right.

Q. There is always some leakage when you haul grain in farm trucks, isn't there?

A. Not necessarily if a fellow is careful, don't drive too fast.

Q. But the only place there was any substantial amount was this one place about 100 yards outside the gate? A. Well, I guess so.

Q. These estimates you gave as to crop production, those would be good crops you speak of, wouldn't they? A. Yes.

Q. And good land and good growing conditions, and everything as favorable as possible?

A. Yes.

Q. Have you farmed yourself any place than this 800 acres you had an option to buy?

A. No.

(Deposition of James H. Noakes.)

Q. That's the only place you have done any farming? A. Yes.

Q. How long were you on that 800 patch yourself? A. Eight years, I think.

Q. And you started that in from raw land yourself? A. Yes.

Q. So that you had,—did you have to clear sage brush? A. Cleared sage brush, yes.

Q. And did you level it and ditch it?

A. Yes. We didn't have it leveled to grade, but had it so we could irrigate it.

Q. In order to irrigate you have to have the land more or less level so you can put the water where you want it?

A. Yes, so you can control it.

Q. If you dumped the water out without the land being prepared you wouldn't get much good from it, it would go to the low spots, you wouldn't get much good from it?

A. That's about the way it would be.

Q. So in order to do a good job you have to level the land, then ditch it, to take the water where you want it? A. Yes.

Q. And that's quite an operation when you are starting in on raw land? A. Yes.

Q. Takes quite a bit of time to work it out just the way you want it for best irrigation?

A. Yes.

Q. On this spraying for weeds, isn't it a fact if the weeds get a head start on the grain there is a

Deposition of James H. Noakes.)

Q. Every real danger if you put enough spray on to kill the weeds you kill the grain? A. No.

Q. Its not dangerous? A. No.

Q. You don't have to worry about that?

A. No.

Q. What do you use for spray?

A. Kind of a fertilizer, I don't know the name of it, its nitrogen.

Q. That's what you use for weeds?

A. Yes.

Q. It don't hurt the grain at all?

A. The stuff they use doesn't, they have developed it so it works on the wide leaves and won't work on the narrow.

Q. That's the way it worked in '53?

A. Yes.

Q. And it wouldn't hurt the grain crop?

A. No.

Q. Did you spray? A. No.

Q. Have you ever sprayed on your place?

A. No.

Q. You have never had any personal experience? A. No.

Mr. Kester: That's all.

Redirect Examination

By Mr. Tonkoff:

Q. What was the type of soil the Meiss Ranch had?

A. There were several different types on the ranch.

(Deposition of James H. Noakes.)

Q. Was it good, bad or indifferent?

A. Some of that is as good as you can find, and some isn't so good.

Q. What does the majority of the ranch consist of, lake bottom or rocky?

A. The majority of the ranch would be lake bottom.

Q. What is lake bottom soil, good or bad?

A. Lake bottom, you say?

Q. Yes. A. Its good.

Q. Does it produce better crops than other types of soil? A. Yes.

Q. Have you ever observed the height of the grain in that area in other years?

A. Yes, I have.

Q. What is the ordinary height of the grain?

A. The barley, seems to me, would be about 3, 3½ feet tall.

Q. What about wheat?

A. Some of it would be almost up to your shoulders in places.

Q. And the rye?

A. One place where I know the rye was as high as a man's head.

Q. And oats?

A. Oats, they were about 3 feet tall, I suppose.

Q. Unless you farm the land in a farmerlike manner in this area, can you produce those crops?

A. No, I wouldn't think you could any place.

Mr. Tonkoff: That's all.

(Deposition of James H. Noakes.)

Recross Examination

By Mr. Kester:

Q. What years are you speaking of when the crops were as high as a man's head?

A. I think that was '47, '48, somewhere in there.

Q. And on what land are you speaking of?

A. That was down there on the lake bottom land.

Q. Aside from that extremely good period in '47 and 8, you haven't seen them that good since? That was an unusual year, wasn't it?

A. Well, now, I don't know whether it was unusual or not.

Q. Were the crops that way all over the entire ranch, or better on some spots than others?

A. No, it seems they were all good.

Q. I believe you said before the nature of the soil is different on different parts of the ranch?

A. Yes.

Q. You get on the bottom of the lake you get a lot more weeds than you get up around the edge where its dobe? A. Yes.

Q. Isn't it a fact that on the bottom land you have quite a problem keeping the water out of it?

A. You have to pump.

Q. The reason for the pump is to get rid of the surplus water, too much water isn't good for the crops? A. No, it isn't.

Q. And close to the dike you get a lot of sub-irrigation, and it keeps the bottom land next to it pretty moist, doesn't it?

(Deposition of James H. Noakes.)

A. Well, now, I don't know.

Q. Have you had any personal experience with the rest of the ranch at all? A. No.

Mr. Kester: That's all.

Mr. Tonkoff: That's all.

JOHN RICHARD RATLIFF, JR.

a witness produced on behalf of the plaintiff, was examined and testified as follows in answer to questions put to him by the respective attorneys:

Mr. Tonkoff: Will you state your full name?

A. John Richard Ratliff, Jr.

Q. And your age? A. 37.

Q. What is your occupation?

A. I'm a farmer.

Q. How long have you farmed?

A. Well, I was born on a ranch and been farming on my own since 1940, and farmed with my dad before that.

Q. In what kind of farming are you principally engaged?

A. Stock, grain, clover, alfalfa.

Q. Where has this been mostly done, what area?

A. Merrill and Tulelake.

Q. Are you familiar with the Meiss Ranch?

A. Yes.

Q. How far from Tulelake is the Meiss Ranch, approximately?

A. Approximately 45 miles.

Q. In what direction?

A. It would be pretty near straight west.

(Deposition of John Richard Ratliff, Jr.)

Q. Did you happen to be on the Meiss Ranch in '53? A. Yes.

Q. What were you doing there?

A. I had a piece of ground rented and was raising potatoes.

Q. How many acres?

A. 100 on my own and 100 for another man.

Q. The total amount planted was 200 acres?

A. Yes.

Q. On what portion of the ranch were the potatoes, north, south, east or west?

A. It would be on the south of the ranch.

Q. How much of your time did you spend over here?

A. I went over there and started to work around the 1st of April, and was there practically all the time until the 1st of November.

Q. In 1953? A. Yes.

Q. Did you happen to observe the crops growing here the first part of June, grain crops?

A. Well, yes, most of it.

Q. What was the condition of it the fore part of June?

A. I thought it looked pretty good.

Q. Considering other crops of a similar nature?

A. Yes.

Q. Could you see anything wrong with it, lack of water, a decided lack of irrigation?

A. Not that time.

Q. Did you notice the soil in relation to moisture

(Deposition of John Richard Ratliff, Jr.)

the latter part of June and first part of July, whether or not it was getting dry?

A. The grain around the potato field showed lack of moisture, the part I was in most of the time.

Q. Did you go over the ranch, any part of it?

A. All except the north side I was around pretty much.

Q. What would you estimate was the grain planting in that area?

A. Acreage, you mean?

Q. Approximately how much grain?

A. Well, I would say somewhere between 750 and 1000 acres, close to the spuds.

Q. Did you notice any change in the condition of the crop as the season went on?

A. Well, there was a field of wheat practically dried up, cracked open.

Q. Cracked open? What do you refer to?

A. The ground cracked open. The barley against the potatoes wasn't bad, but that place was a little higher than the rest of it, it was burning by the 1st of July.

Q. You mean 1000 acres was the entire crop?

A. No, the grain crop around where I was in there practically every day.

Q. About how wide were those cracks the latter part of July, first of August, how wide were they?

A. Anywhere from a half inch to an inch and a half.

Q. How long were they, just approximately?

Deposition of John Richard Ratliff, Jr.)

A. They might vary from 1 foot long to 10 feet long.

Q. Were they numerous on the ground?

A. Running in all directions.

Q. Did the crop show the effects of lack of moisture?

A. By the 15th of July they were showing lots of effect from the lack of moisture.

Q. And is it possible in that area to grow grain without irrigation, in your experience, successfully?

A. I would say it would be possible to grow a crop of grain without irrigation, but not practical.

Q. Was there ample water for irrigation?

A. Yes.

Q. How do you irrigate that property, generally?

A. There was some of it should have been, could have been sprinkled.

Q. Is there a sprinkling irrigation on that ranch? A. Yes.

Q. Was it used by any one that summer?

A. Yes, it was used by some one by the name of Jeff, but just a day or two.

Q. What time of the year was that, what month?

A. It was done in the first half of July.

Q. Where was it used, on the grain crop?

A. It was used, part of it used on the grain crop. I guess all the sprinkling done that I remember of at that time was used on the grain crop.

Q. How much of a sprinkling system have they?

A. I think half a mile of it.

(Deposition of John Richard Ratliff, Jr.)

Q. Now, Mr. Ratliff, while you were there did you notice any weeds appear in the crop?

A. One field was completely taken.

Q. Where was that?

A. Immediately east of my potato field, in the southeast corner of the ranch.

Q. How many acres in that field?

A. Somewhere between 3 and 500 hundred, I guess.

Q. Was a part of that field later plowed up?

A. Part of it, or all of it, I wouldn't say for sure.

Q. Plowed up? A. Plowed up.

Q. Was any spraying done there for the weeds?

A. None that I know of.

Q. What is the customary practice here when weeds appear in grain crops?

A. The customary practice has been to spray with 2-4D.

Q. And that kills the weed growth?

A. Practically all the weeds.

Q. That was not used on this particular tract?

A. Not that I know of.

Q. What occurs if you don't destroy the weeds?

A. Depends on how bad the weeds are. If they choke the grain out its impossible to harvest.

Q. What was the situation in this area?

A. I think the weeds practically took the grain, I don't think there was any left.

Q. You say the weeds covered an area of 3 to 5 hundred acres?

A. That field where the weeds was, I was never

Deposition of John Richard Ratliff, Jr.)

n over the field but along two sides of the field, and from there I could see the majority of that field.

Q. What would you say was the total amount of acreage planted to grain on that ranch? I assume you would have to approximate that.

A. Somewhere between 3 and 4 hundred acres, I would judge.

Q. Your own estimation?

A. My own estimation.

Q. Are you familiar with the type of soil on that ranch? A. Yes.

Q. What kind of soil is it, as to fertility?

A. The majority of the ground on that ranch is probably as rich as anywhere in the country.

Q. Do you know what it is capable of producing, or what is the production in that area of grain per pound, say of wheat?

A. Taking into consideration the ground where the wheat was planted that year, I would say 1500, 2000 pounds of wheat.

Q. What about barley?

A. The barley as a whole should have made 11½ tons to the acre.

Q. Three thousand pounds. What about oats?

A. Oats should have been pretty close to 2500.

Q. And rye? A. Rye 1500.

Q. Did you notice the effect on the crops before harvest due to the lack of moisture, lack of irrigation? What effect it had on the crop?

A. I happened to be over there when they was threshing, I think the wheat crop was practically a

(Deposition of John Richard Ratliff, Jr.)

loss. There might have been another cause than the lack of water, but I would say lack of water was the main cause.

Q. What other causes do you have in mind?

A. It could have been a little frost, but I don't think so.

Q. What was the weather conditions in '53?

A. To the best of my knowledge I didn't have any frost in my potatoes from, oh, around the 25th of June somewhere until the 15th or 20th of September.

Q. How does that compare with other seasons?

A. About normal.

Q. Was that season any longer, any warmer in the summer time? When were the crops ready for harvesting, what time of year?

Mr. Kester: What crops are you speaking of?

Mr. Tonkoff: Grain crops.

A. I believe there could have been some grain harvested by the 15th of August.

Q. Do you know when the harvest commenced, to the best of your recollection?

A. It was after the 1st of September, I am sure.

Q. What would you say was the growing conditions that year, good or bad?

A. To my own judgment I thought it was a pretty fair growing season.

Q. Did you happen to see them harvest the grain that year?

A. I wasn't out where they combined, no.

(Deposition of John Richard Ratliff, Jr.)

Q. Did you go over the ground after they combined? A. No.

Q. Did you see the crops delivered?

A. I seen the trucks go by the potato field when we was harvesting.

Q. Did you notice any grain on the road between the field and Macdoel? A. Yes.

Q. Was that more than the usual amount lost by delivery?

A. Let's put it this way, it was more than we would have lost.

Q. Can you account for the grain on the road, how it happened out there?

A. Lack of tarp on top of the load.

Q. Is it customary to use tarps in delivering grain?

A. The majority of the people do.

Q. What's the purpose?

A. Keeps the grain from blowing out.

Q. How often did you see Mr. Barr at the ranch that year, on how many occasions?

A. Three, possibly four, times. He was there when we planted in the spring, he was there at harvest, and once or twice I saw him through the summer.

Q. How long periods would he remain on the ranch?

A. I couldn't definitely say how long he would stay, I know I would see him around, two or three days, through harvest and in the spring, he wasn't there the greater majority of the time.

(Deposition of John Richard Ratliff, Jr.)

Q. You saw the weeds on the ground by the potato patch. In your opinion as a farmer, grain grower in this area, would you say that work was done in accordance with the farming standards followed in this community?

Mr. Kester: I object to the form of the question, it asks for the conclusion of the witness, there has been no basis for his qualification, and its not a proper subject for expert testimony.

Mr. Tonkoff: How long did you say you have been growing rye, wheat, oats and barley in this country?

A. As I said, I was born in this country, was raised on a ranch, all my life I've farmed with my dad from the time I was big enough to start farming. He in turn was raised here.

Q. Are you familiar with the farming practice and standards in this community?

A. I think so.

Q. With that in mind, from what you observed there, what farming that was done on that 1000 acres of wheat, would you say proper farming standards were followed?

Mr. Kester: Same objection.

Mr. Tonkoff: On the thousand acres?

A. That included barley and rye.

Q. Would you say that proper farming standards were applied to the farming here, were used in the growing and cultivation of those crops?

A. I wouldn't say they were.

Deposition of John Richard Ratliff, Jr.)

Q. Would you say it was done in a good farmer-like manner, the cultivation of the crops?

A. The cultivation I can't say.

Q. I mean growing, irrigating, spraying?

A. There was practically no irrigating at all one, there was no spraying done, and there was definite signs the grain should have been irrigated, and one piece especially should have been sprayed.

Q. Would you say the growing of that crop was done in a good farmerlike manner?

A. I can't say it was.

Q. Would you say it was done in an extremely bad manner?

Mr. Kester: Same objection.

Mr. Tonkoff: Would you say it was neglected?

A. It was neglected, that right.

Q. Did Mr. Barr and his attorney, Mr. Kester, ever talk to you concerning your testimony?

A. I can't say who the attorney was, Mr. Barr did in a restaurant.

Mr. Kester: I talked to you, yes.

Mr. Tonkoff: How long ago?

A. It was last May or June, I believe.

Q. What did Mr. Barr have to say about it?

A. He asked me a bunch of questions very similar to what you have asked me this afternoon.

Q. What did you tell him?

A. To the best of my knowledge about the same as I have told you.

Q. Did he make any response to it?

A. No.

(Deposition of John Richard Ratliff, Jr.)

Q. Was there an abundance of water to irrigate that year? A. Definitely so.

Q. How many wells are on that ranch?

A. There is 3 wells on the ranch that is set up with pumps, another its possible to use, and an abundance of water in the lake.

Q. Is the level of the water in the lake above the farming area?

A. A big portion of it was at that time.

Q. Have you seen crops grown on that area before when you have been on the ranch?

A. I was never close to crops on the ranch before I had a small patch of spuds on it year before last. I wasn't there as much after that year.

Q. What was the height of the grain the year before,—barley, rye, oats?

A. There was barley in there just practically as high as my shoulders at the time it headed out.

Q. Was there any difference in the height of the grain with the year 1953?

A. Yes, it was never as good that year as the year before.

Q. Can you give me any explanation why the grain wasn't as high as it was the year before?

A. Well, some of that grain was pretty near that high that same year, but the short grain was on ground that had a little slope to it, it would go right back to the lack of moisture.

Q. Where did you see the high grain that year, 1953? A. In the lower ground.

Q. Did the lower ground get more water?

Deposition of John Richard Ratliff, Jr.)

A. Your water table is in low ground.

Q. Was there ample water to irrigate the higher ground? A. Yes.

Q. How much of the time did you spend on the ranch that year?

A. I would say I spent close to 10 hours a day, better than 6 days a week.

Mr. Tonkoff: That's all.

Cross Examination

By Mr. Kester:

Q. Mr. Ratliff, your interest was in the potato ground and not the grain ground, except as you might notice? A. That's right.

Q. You had about 200 acres of potatoes?

A. That's right.

Q. And the time you were on the place was almost entirely within those 200 acres?

A. Taking care of my potatoes involved considerable work and passage around different parts of the ranch, the whole south half of the ranch.

Q. Was there any grain immediately next to your potato field? A. Yes.

Q. Was that where this wheat patch was you spoke of? A. Yes.

Q. Was there any other grain between your field and the main dike east of you besides this wheat patch?

A. There was the one big field there. No, I think it was partially but in two by the drain ditch, but not entirely.

(Deposition of John Richard Ratliff, Jr.)

Q. That's the only area that had any wheat that you noticed?

A. So far as I noticed. I can't make any statement about the north half of the ranch.

Q. That field immediately east of you is low, isn't it? Bottom land? About the lowest part of the ranch?

A. I couldn't say as far as a survey's standpoint, I know its the first to dry up.

Q. That was kind of a wet spring?

A. Definitely so.

Q. Rained all of May and half of June?

A. The first week in June.

Q. And practically all of May? A. Yes.

Q. So it was hard to get out and work in the field, it was pretty muddy? A. Yes.

Q. When the fields are pretty wet doesn't that tend to drown out the barley, for instance?

A. Yes.

Q. In your opinion, one reason the weeds got started was because the water drowned out the barley, isn't it?

A. I don't hardly believe so. In the first place, I don't think too much of that field was barley, the big majority of it was rye. Some of it was barley.

Q. Didn't you tell me before the weed patch got started because the water drowned out the barley?

A. I don't believe I did. I might have. I made one statement to you before but I think it was pertaining to my potato patch.

Deposition of John Richard Ratliff, Jr.)

Q. Your spuds drowned out, didn't they?

A. Yes.

Q. So you didn't get any potato crop and that was too much water? A. Yes.

Q. You have to get just the right amount of water, not too much, not too little,—it requires judgment and experience to get the right amount?

A. Mostly judgment and experience.

Q. On grain, for instance, if you irrigate in the summer time it would tend to start a re-growth?

A. Not if its at the right time.

Q. The question of the right time involves some experience and judgment? A. That's right.

Q. If its too late, you'd get a re-growth?

A. Yes.

Q. And that would tend to delay the harvest?

A. Yes.

Q. And tend to get caught by an early frost?

A. That's right.

Q. And you have to make a pretty fine decision as to when to irrigate?

A. Over a period of 10 days or 2 weeks.

Q. There was some trouble that year, didn't you have to hire some airplanes to circle around to keep the frost off your potatoes?

A. Yes, there was a weekend on, around the 26th of August, I definitely remember it, but I wouldn't have needed it but I was afraid I would, it was on the border line.

Q. You weren't around there from the 1st of

(Deposition of John Richard Ratliff, Jr.)

September until you started your potato harvest in October?

A. Yes, I was there pretty much until the 20th of September, there was probably a period of a week or 10 days, maybe 2 weeks, from the 20th of September until we started harvest.

Q. When did you start harvesting potatoes?

A. I think I moved the machinery over there between the 12th and 14th of October.

Q. Don't you remember telling me you weren't there from the 1st of September to harvest?

A. No, for the simple reason that from the time we quit irrigating until harvest I had about 2 weeks work.

Q. When did you quit irrigating the potatoes?

A. Oh, around, I believe we was finishing up irrigating the morning we had the plane, about the 20th of August.

Q. Then you had a couple of weeks work after that?

A. There was probably two days from irrigating until we started work on the ditches, which would probably have been 5, 6, 7 days, so there might have been a week. Then between the 25th or 6th of August I wasn't there, and then after the 20th of September.

Q. You weren't there during the grain harvest?

A. Part of the grain harvest was going on then, yes.

Q. The grain harvest was pretty well over in October, wasn't it?

(Deposition of John Richard Ratliff, Jr.)

A. They were still harvesting grain.

Q. Did you say there was no spraying done at all?

A. No spraying in the fields, to my knowledge.

Q. There was spraying on the ditch bank?

A. On the ditch bank, yes.

Q. Potatoes are kind of sensitive to that spray, aren't they? A. Yes.

Q. If some of that spray had dropped over on your potatoes it would have killed them?

A. Yes.

Q. And you would have had quite a holler, wouldn't you? A. I would, yes.

Q. Isn't it a fact that when to spray and how much to spray requires some skill and judgment?

A. Not necessarily on the part of the farmer.

Q. Does that spray bother grain crops at all?

A. Not that I know of.

Q. Did you ever spray grain fields?

A. Yes.

Q. Isn't there a chance if its the wrong time it might kill it?

A. It might if the grain was just barely coming up.

Q. So in your opinion no matter how much you spray after the grain got started——

A. (Interrupting) But the man who sells the spray will give you very definite information how much to use and when to put it on.

Q. You would rely on the judgment of a commercial spraying man.

(Deposition of John Richard Ratliff, Jr.)

A. Or an entomologist, a man who has worked with chemicals.

Q. And if he told you to spray for weeks you would rely on his opinion?

A. I would say so.

Q. When did you first go on the place in the season of '53?

A. Somewhere around the 20th of April.

Q. Had some of the planting already been done when you got there, grain planting?

A. Some rye planting, and possibly some wheat.

Q. You spoke of an area of higher ground west of the main part of the lake bed, do you happen to know how much cultivation that had prior to planting? A. No, I don't.

Q. It would be good practice to cultivate ground before planting grain? A. I would think so.

Q. And if the grain was planted without cultivating, you wouldn't expect much, would you?

A. No.

Mr. Kester: I think that's all.

Redirect Examination

By Mr. Tonkoff:

Q. Mr. Ratliff, did you plant potatoes when they were planting grain? A. Yes.

Q. How wet was it then? A. Pretty wet.

Q. Can you plant in this part of the country when its wet? A. Yes.

Q. Does the moisture keep people from planting?

(Deposition of John Richard Ratliff, Jr.)

A. Yes, it would, but it has to be awful wet.

Q. Was it wet enough in '53 to delay planting?

A. Not very much, no. I prepared the ground and planted 200 acres of spuds from somewhere around the 25th of April to the 7th of June, and there was very few days we didn't work.

Q. Was there any delay in planting due to moisture in '53? A. A little, yes.

Q. How many days, approximately?

A. During the time we was working there we missed working 3 or 4 half days, and either 2 or 3 full days.

Q. Did the moisture delay the planting of the wheat crop that year?

A. It shouldn't have delayed it any longer than it did us on our spuds.

Q. Was there any damage to the crop due to the wetness of the planting season?

A. Very little, there may have been a few little spot holes, small areas, an acre or two.

Q. Do you consider that negligible?

A. On a big acreage, yes.

Q. In determining when or when not to irrigate, does it require the grower's presence on the property to make that determination?

A. It would require my presence if I was doing it.

Q. Was Mr. Barr there enough to determine when to irrigate?

Mr. Kester: In the first place he said he wasn't there enough to know, it calls for a conclusion.

(Deposition of John Richard Ratiff, Jr.)

Mr. Tonkoff: You were there enough to know whether he was there enough.

A. I believe Clay was down there about that time, as near as I can remember.

Q. When, what time?

A. The latter part of June.

Q. Did he irrigate at that time? A. No.

Q. Was any damage done to the crop by reason of this frost that appeared in August?

A. To the best of my knowledge there was no frost. But I took precautions against it.

Q. Now, were the weeds killed on the ditch bank where it was sprayed? A. Partially.

Q. How far was that ditch bank from your potato field?

A. The ditch bank I noticed had been sprayed was about half a mile from the potato patch.

Q. Were there weeds between the ditch bank and the potato field?

A. It was south of the ditch bank.

Q. Did the spray approach anywhere near the potato patch? A. With the plane? No.

Q. Could he have passed without injury to the potatoes?

A. Yes, they spray that way all the time.

Q. How close can he get to the potatoes spraying by plane without injury?

A. They spray within 200 feet all the time.

Q. How far was the ditch bank that was sprayed?

A. Approximately half a mile. The ditch bank

Deposition of John Richard Ratliff, Jr.)

noticed that had been sprayed run along the north side of the field that had the weeds in it, and the north side of the field that had the potatoes in it.

Q. How far did the weeds start north of the potatoes. You say the weed bank was east of the potatoes. Spraying those weeds would not have injured the potatoes in any manner? A. No.

Q. I think you said you wouldn't use your own judgment in using spray? Why?

A. For the simple reason there is so much change in developing these chemicals you can't keep up with it.

Q. Whose judgment would you rely on?

A. Somebody that handles them, or at least has the latest information about it.

Q. Is that information available in this district?

A. Yes.

Q. Where do you get it?

A. One fellow in Tulelake, Green Spray Service, he puts out very reliable information. And a dealer in Merrill, Walker Brothers, and there are probably one or two in Klamath Falls.

Q. Does the Department of Agriculture put out that information? A. Yes.

Q. Do you have that here?

A. At the County Agent's office.

Q. Do you have a Soil Conservation office here?

A. Yes.

Q. Do they put out information in that respect?

A. As to their own experiments.

(Deposition of John Richard Ratliff, Jr.)

Q. How about the Reclamation Service?

A. I don't know.

Mr. Kester: Can you spray while its raining?

Mr. Tonkoff: When did the rain cease that summer?

A. I don't know, we finished planting potatoes while it was raining, after the 7th of June.

Q. When did you observe the weeds, how long after that? A. About that same time.

Q. Was the wheat such that you could have sprayed after that?

A. I would say you couldn't spray after the 6th or 7th of June.

Mr. Tonkoff: That's all.

Mr. Kester: That's all.

Notary Public's Certificate attached.

[Endorsed]: No. 15022. United States Court of Appeals for the Ninth Circuit. J. P. Tonkoff, individually and as trustee, Appellant, vs. Clay Barr and Betty Barr, husband and wife, Appellees. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed: February 3, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15022

J. P. TONKOFF, individually and J. P. Tonkoff,
as Trustee of E. J. Welch and Viola Welch,
husband and wife, Roland P. Charpentier and
Effie Charpentier, husband and wife, and John
W. Cramer, Appellant,

vs.

CLAY BARR and BETTY BARR, husband and
wife, Appellees.

DESIGNATION OF STATEMENT OF POINTS
AND RECORD ON APPEAL

To: Honorable Paul P. O'Brien, Clerk, United
States Court of Appeals, Ninth Circuit; and
McGuire, Shields, Morrison & Bailey, and Ran-
dall B. Kester, Attorneys for Appellees:

The appellant above named adopts the statement
of points and designation of contents of record on
appeal which are contained in the typewritten tran-
script of the record forwarded to the Clerk of the
United States Court of Appeals for the Ninth Cir-
cuit, as appellant's statement of points and designa-
tion of record on appeal to be printed in accordance
with Rule 17 of the Rules of the United States
Court of Appeals for the Ninth Circuit.

Dated this 6th day of February, 1956.

/s/ FERTIG & COLOMBO,

/s/ TONKOFF, HOLST & HOPP,

/s/ By W. B. HOLST,

Attorneys for Appellant

[Endorsed]: Filed February 8, 1956. Paul P.
O'Brien, Clerk.

In the
United States Court of Appeals
For the Ninth Circuit

J. P. TONKOFF, individually, and J. P. TONKOFF, as
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and wife, Roland P. Charpentier and Effie Char-
pentier, husband and wife, and John W. Cramer,
Appellant,

VS.

CLAY BARR AND BETTY BARR, husband and wife,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

BRIEF OF APPELLANT

TONKOFF, HOLST & HOPP
Yakima, Washington

FERTIG & COLOMBO
Portland, Oregon
Attorneys for Appellant

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vs.

CLAY BARR AND BETTY BARR, husband and wife,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

BRIEF OF APPELLANT

JURISDICTION

This action was commenced in the United States District Court for the District of Oregon by reason of the diversity of citizenship, U.S.C.A., Title 28, Sec. 1332; plaintiff is a resident of the State of Washington, the beneficiaries E. J. and Viola Welch are residents of the State of Washington, the beneficiaries Roland and Effie Charpentier and John W. Cramer are residents of the State of Idaho, the respondents Clay and Betty Barr, who will be hereinafter referred to as defendants, are residents of the State of Oregon, and Kerr-Gifford Co., a corporation, is incorporated either in the State of

Oregon or some state other than the State of Washington, and the amount sued for is in excess of \$3,000.00, exclusive of interest and costs (R. 3, 4).

This case comes within the appellate jurisdiction of this court upon appeal from final judgment in actions at law or in equity, U.S.C.A., Title 28, Sec. 1291. Findings of Fact and Conclusions of Law and Final Judgment were entered in the District Court on the 8th day of December, 1955 (R. 39-46). Notice of appeal therefrom was filed the 28th day of December, 1955 (R. 47) and bond for costs on appeal was filed the 28th day of December, 1955 (R. 47-49).

STATEMENT OF THE CASE

Appellant J. P. Tonkoff, herein designated as plaintiff, brought the above action, individually and as trustee of E. J. and Viola Welch, husband and wife, Roland and Effie Charpentier, husband and wife, and John W. Cramer, as beneficiaries under a trust agreement for the recovery of damages against the defendants Clay and Betty Barr, husband and wife, which damages arose from the failure of the defendants Barr to perform their obligations in accordance with the terms of a certain trust and assignment of the crops which were grown during the year 1953 on what is known as the Meiss Ranch situated in the northern part of California near Macdoel.

THE PLEADINGS

In brief, the plaintiff alleges in his complaint that he was one of the trustees in a certain declaration of trust executed on the 10th day of June, 1953, at Spokane, Washington. That Horton Herman, the other trustee named in the declaration of trust, had resigned as such prior to the bringing of this action (R. 15). That at the time of the execution of the declaration of trust, the defendants Clay and Betty Barr were operating a certain property located in Siskiyou County, California, known as the Meiss Ranch, under a lease dated the 7th day of May, 1953, and which lease named Frank and Dorothy Kofues, husband and wife, and Albert G. and Virginia Kirschmer, husband and wife, Lessors, and the defendants, Clay and Betty Barr as Lessees, and at which time the crops grown upon said property were in good condition (R. 4). At the time of the execution of the declaration of trust the defendants Clay and Betty Barr warranted that there were approximately 2800 acres of crops growing when in truth and in fact said warranty was false and untrue and that there were crops planted and growing in the following amounts:

Oats	1,086 acres
Wheat	132 acres
Barley	1,200 acres
Rye	250 acres

Total2,668 acres

That defendants Clay and Betty Barr refused, failed and neglected to perform in accordance with the

terms and conditions of their assignment of said crops, which assignment provided that the said defendants would farm the said property in a good and farmerlike fashion, in that:

(a) Said defendants failed, refused and neglected to properly, or at all, spray the growing crops during the growing season in order to destroy noxious weeds which had infested the land and crops, when the exercise of ordinary care and the customs of the locality required said defendants to spray said crops to destroy noxious weeds, so that as a consequence thereof the crops grown on 446 acres could not and were not harvested by the said defendants.

(b) That said defendants failed, refused and neglected to irrigate said crops in a good and farmerlike manner (R. 5) so that as a consequence thereof a large quantity of the crops were either totally destroyed or unable to ripen and develop so they could be harvested.

(c) That said defendants during the first part of August plowed under 120 acres of oats without the consent, knowledge and authority of the trustees or beneficiaries named in the declaration of trust.

(d) Said defendants failed, refused and neglected to harvest the crops in a good and farmerlike fashion in that the harvesting was performed in such a manner in operating the harvesting machines at so fast a speed and in such a manner that approximately 10 per cent of the grain crops were either not harvested or wasted.

(e) That said crops were conveyed from the Meiss

Ranch to Macdoel, California, in trucks which were inadequate or improper for the conveying of said crops so that approximately 5 per cent of the crops escaped over the top, sides and bottom of said trucks.

That had the defendants Clay and Betty Barr cultivated, farmed and harvested said property and crops named in a good and farmerlike fashion, they would have produced and harvested:

Barley: 3,500 pounds per acre; value per hundred weight, \$3.00.

Rye: 1,200 pounds per acre; value per hundred weight, \$1.90.

Wheat: 1,500 pounds per acre; value per hundred weight, \$3.10.

Oats: 4,000 pounds per acre; value per hundred weight, \$2.30.

Said crops would have been valued at and would have brought on the market in excess of \$250,000.00, at least \$125,000.00 of which would have been available to pay plaintiff and his beneficiaries the sum of \$72,500.00.

That the defendant Kerr-Gifford Co. is engaged in the business of buying and selling grains and that said crops produced from said property were sold to said company for approximately \$70,000.00, one-half of said sum being payable to parties other than plaintiff and beneficiaries, to-wit: owners of the property. That the monetary proceeds from said crops are being retained by the defendant Kerr-Gifford Co., which company refuses to give up any part or portion of said proceeds notwithstanding the fact it was advised and knew

that the plaintiff was and now is the owner of said crops as an individual and as trustee in accordance with the terms, conditions and provisions of the assignment and declaration of trust (R. 7). That further plaintiff asks judgment against defendant Kerr-Gifford Co. for \$35,000.00, or 50 per cent of the proceeds from said crops, whichever is the greater sum, with interest at the rate of 6 per cent from November 15, 1953, and for the sum of \$72,500.00 from defendants Clay and Betty Barr, with interest at the rate of 6 per cent from November 15, 1953, less such sums as may have been paid to plaintiff individually and in his capacity as trustee by Kerr-Gifford Co. (R. 8).

To this complaint the defendants Clay and Betty Barr interposed a motion to dismiss (R. 16, 17) which motion was denied (R. 18) and by way of answer the said defendants allege that they admit the residences of the parties as stated in the complaint and that plaintiff is one of the named trustees and also a beneficiary under the declaration of trust attached to the complaint; admit that the defendants for a time operated the Meiss Ranch in Siskiyou County, California under lease from Frank and Dorothy Kofues and Albert and Virginia Kirschmer; admit that the crops were sold to Kerr-Gifford Co., which at all times still holds the proceeds from the sale of said crops; but they deny the remainder of complaint (R. 19). As a defense defendants allege that on or about the 9th day of July, 1953, Horton Herman, named as beneficiary under the declaration

of trust, for value received sold, assigned and transferred to Harvey S. Barr all his right, title and interest as a beneficiary thereunder and that on or about the 12th day of October, 1953 the defendants for value received sold, assigned and transferred to A. G. Kirschmer the sum of \$15,000.00 which they were to receive from the defendant Kerr-Gifford Co. for the proceeds of said crops under the declaration of trust; that Harvey S. Barr, assignee of Horton Herman, did not consent to the then purported resignation of Horton Herman as trustee under the declaration of trust and refused to accept such resignation in that the complaint failed to join the indispensable parties in that it fails to join Harvey S. Barr, assignee of the beneficial interest of Horton Herman, and that it fails to join Horton Herman who is still co-trustee under the declaration of trust, and fails to join A. G. Kirschmer, assignee of defendant Clay Barr.

For answer to the counter-claim of defendant Kerr-Gifford Co. for interpleader, the defendants Barr allege (R. 20) that the counter-claim fails to state a claim upon which an interpleader can be granted; secondly, deny that Kerr-Gifford Co. is entitled to Attorneys' fees from the proceeds of said grain crops.

That any demand by plaintiff J. P. Tonkoff, individually or as trustee, for the sum of \$15,000.00 reserved to the defendants Barr by the assignment of June 10, 1953, thereafter assigned to A. G. Kirschmer, is wholly a sham and frivolous and without right or

color of right and gives no justification to defendant Kerr-Gifford Co. for refusing to pay said sum to A. G. Kirschmer.

That A. G. Kirschmer is a citizen and resident of the State of Texas; that Harvey S. Barr and Horton Herman are citizens and residents of the State of Washington; that the court has no jurisdiction to grant (R. 21) interpleader in this proceeding for the reason that none of the claimants to the proceeds of said crops held by Kerr-Gifford Co. is a citizen or resident of the State of Oregon (R. 22).

In answer and counter-claim to the interpleader defendant Kerr-Gifford Co. in brief alleges: that it is a corporation organized under the laws of the State of Oregon engaged in the business of buying and selling of grains and that it purchased from the defendants Barr a crop produced upon the premises mentioned in plaintiff's complaint and that said defendants are entitled to one-half of the proceeds of said crop (R. 23).

That during the crop year of 1953 defendants Clay and Betty Barr sold to defendant Kerr-Gifford Co. grain produced by them on lands leased from Kirschmers and Kofueses, which lease provided that the lessees were entitled to one-half of the crop; that the grains were purchased for the full purchase price of \$88,746.53; that the defendants Clay and Betty Barr, as lessees, or those claiming by, through or under them, were entitled to one-half of the proceeds, name-

ly, \$44,373.28, which the Kerr-Gifford Co. presently holds for persons entitled to same (R. 24).

That said defendant believes and therefore alleges that defendants Clay and Betty Barr have assigned to A. G. Kirschmer of Amarillo, Texas, all right, title and interest in and to the sum of \$15,000.00 of said proceeds, being the cost of harvesting, as alleged in plaintiff's complaint.

That the sum of \$15,000.00 was demanded by plaintiff J. P. Tonkoff and that the defendants cannot safely determine which of said claimants are entitled to proceeds; that the said defendant asked that A. G. Kirschmer be made a party defendant in said action (R. 25).

That the court establish which of said parties are entitled to the sum of \$44,373.28, or any portion thereof, and that Kerr-Gifford Co. be discharged from any and all liability upon the depositing by it into the registry of the court the sum in its possession.

An order was entered bringing in A. G. Kirschmer as an additional party defendant (R. 26, 27).

By further pleading the plaintiff alleges that prior to June 1953 E. J. Welch through the plaintiff instituted an action in Superior Court of the State of Washington in Spokane County against Clay Barr and Sterling Higgins charging said defendants with (R. 29) fraudulent conspiracy and praying for damages in excess of \$80,000.00.

At the said time Horton Herman was a practicing attorney in Spokane, Washington, and appeared in the

above action on behalf of defendant Clay Barr. That during the course of the trial and before the same was consummated Horton Herman made a proposal of settlement on behalf of defendant Clay Barr. The settlement was consummated and it was agreed that the Welch claim would be settled and compromised at \$62,500.00, payable in the following amounts:

J. P. Tonkoff \$15,000.00; E. J. and Viola Welch \$27,500.00; Roland and Effie Charpentier \$15,000.00; and John W. Cramer \$5,000.00;

providing that said sum was to be obtained from the proceeds of a 2,800 acre grain crop in which the defendant Clay Barr had a one-half interest and situate in Siskiyou County, California on property known as the Meiss Ranch.

That during said negotiations Horton Herman insisted an additional sum of \$10,000.00 be paid to him as attorneys' fees and that said sum should be obtained from the grain crop. Therefore, the declaration of trust was executed by the parties (R. 12).

Thereafter, on or about the 9th day of July, 1953, Horton Herman conveyed his interest (R. 30) to Harvey S. Barr, father of defendant Clay Barr, for the sum of \$7,500.00.

That on or about the 2nd day of July, 1953, plaintiff and E. J. Welch, having been informed that the grain crop was improperly farmed, induced the said Clay Barr to visit said Meiss Ranch in the company of plaintiff and E. J. Welch where it was discovered said crop

was grievously neglected and that the same had not been irrigated nor cultivated, and at which time said Clay Barr promised and agreed to immediately start farming said crop, but refused and failed to comply with said promise and agreement.

Thereafter, on or about the 12th day of October, 1953, defendants Clay and Betty Barr assigned and transferred to A. G. Kirschmer \$15,000.00 provided for in the declaration of trust to be paid to Clay Barr.

That during the months of October and November, 1953 the defendants Barr harvested the crops growing on the Meiss Ranch and refused and failed to deposit the crops in accordance with the terms of the declaration of trust, at defendants' expense in warehouses and have warehouse receipts issued in the names of the assignees (R. 31).

That said crop assignments under the declaration of trust were to be sold not later than November 5, 1953, and all sums in excess of \$72,500.00, the assignee shall upon receipt of said sum endorse and deliver over to the Barrs all warehouse receipts for crops not sold, but instead the defendants Barr delivered and sold all crops to the Kerr-Gifford Co.

That the said Horton Herman refused to join in a suit with plaintiff against the defendants Barr so that the plaintiff brought an action naming Horton Herman as a party defendant. Thereupon the said Horton Herman filed a motion and advised the court there was no

merit to plaintiff's claim and consequently said action was dismissed.

Thereafter, prior to January 26, 1954, demand by this plaintiff and beneficiary was made upon Horton Herman for his resignation as trustee under the declaration of trust or an alternative action would be instituted to remove him as trustee (R. 32).

Pursuant to said demand, Horton Herman resigned as trustee (R. 29).

That Harvey S. Barr is a total stranger to the declaration of trust and there exists no privity of contract between Clay Barr and Harvey S. Barr and he has no standing in this court under said declaration of trust (R. 33).

By further pleading Clay and Betty Barr allege that of the fund of \$44,373.28 deposited in court by Kerr-Gifford Co., the sum of \$15,000.00 was expressly reserved to the defendants by assignment of June 10, 1953, to cover their cost of harvesting (R. 34) and that on or about the 12th day of October, 1953, the defendants Barr for value received sold, assigned and transferred to A. G. Kirschmer, who resides in Amarillo, Texas, the sum of \$15,000.00, to which the defendants were entitled from the proceeds of the 1953 crops growing on the Meiss Ranch, and that the assignment is in full force and effect.

That the defendants hereby assert on behalf of A. G. Kirschmer a claim in the sum of \$15,000.00 out of the proceeds now on deposit with the court (R. 35).

By order of court on September 15, 1955, Kerr-Gifford Co. was discharged from further liability, either to plaintiff or to the defendants Clay and Betty Barr, or the additional defendant, A. G. Kirschmer, because of the payment of the money in the sum of \$44,373.28 into the registry of the court on May 20, 1954. That a determination of the amount, if any, to be paid the defendant Kerr-Gifford Co. out of said funds for costs and attorneys' fees be deferred pending further proceedings.

The court retained jurisdiction of the proceedings for the purpose of determining the right of plaintiff, defendants Clay and Betty Barr and A. G. Kirschmer to the said fund (R. 36, 37).

The cause thereupon came on for trial on the issues made between plaintiff and defendants Barr.

THE EVIDENCE

The testimony at the time of trial disclosed that James C. Stevenson, Sr. was and is a grain farmer and stockman residing at Klamath Falls, Oregon. He acquired the Meiss Ranch in 1944 (R. 59). The property is located in Siskiyou County, California, near Macdoel, California (Ex. 21, R. 75) and consists of 13,000 acres, over 3300 acres (R. 81, 101, 361) is irrigable and is tillable peat land, meadows and alfalfa (R. 77). The balance of the acreage is pasture land.

At the time of the acquisition of this property, the now irrigable land was under water and covered with

tules (R. 60, 101, 361). Mr. Stevenson built a dike on the east portion of the property, pumped the water over the dike and drained and cleared the property of the tules. He planted the farm to barley, oats, wheat and rye.

Commencing with 1945, with the exception of about 3 years (R. 61), James C. Stevenson, Jr., son of the owner, managed the property (R. 100). While Stevenson, Jr. was managing the property, it was sold to Frank Kofues and A. G. Kirschmer of Texas, for \$1,-200,000.00. Each of the purchasers had an undivided one-half interest in the property (R. 101, 437). The sale of the ranch was made subject to leases, which consisted of 200 acres which were situated on the south side of the ranch north of the building site and west of the lake, which in 1953 were planted to potatoes (R. 5, 430). There was also a lease in existence by which Noakes was farming 800 acres (R. 101, 366), which property was located on the extreme southern part of the ranch and east of the lake which was created by the dike (R. 431). Mr. Stevenson, Sr., at the time of the sale of the property to Kofues and Kirschmer, retained the pasture rights of the entire ranch, including the property which was farmed, upon which he pastured 1000 head of stock over the entire property (R. 62).

The property is located at the foot of the mountains in the locality of Mt. Shasta, and collects the drainage from the hills each spring so it is necessary to pump the water over the dike and into the lake in early spring

(R. 103), and until the 1st of July the lake water can be used for irrigation (R. 79, 94). In addition to the lake water, there are three creeks that run through the property, together with 7 wells all of which are equipped with pumps (R. 65, 104, 108).

In the early spring the property is drained by means of canals leading from all portions of the ranch to the dike and from which the water is pumped an elevation of 7 or 8 feet over the dike into the lake (R. 93, 102). During the early summer when the farm land is in need of irrigation, the gates which form a part of the dike are opened and the water is allowed to run back through the canals as indicated on the map and the water is used for irrigation (R. 92).

James C. Stevenson, Jr. continued to manage the ranch after it was purchased by Kofues and Kirschmer from August 7th until May 5th, 1953 (R. 106, 120). Up to May 5th James C. Stevenson, Jr. had planted 1200 acres to grain (R. 106, 123, 188), at which time Clay Barr and wife entered into a lease agreement with Kofues and Kirschmer, leasing the ranch for a period of 10 years, the rental being 50 per cent of the crops to go to the owner and the remaining 50 per cent to the lessee Barr (Ex. 14, R. 181, 182, 192). Barr took over the management of the property and planted in addition to what was planted 250 acres of rye, 132 acres of wheat, and approximately 1085 acres of oats (R. 106), the total planted acreage amounting to 2666 acres.

Stevenson, Jr. was to remain on the ranch as an employee of Kofues, Kirschmer and Barr at a salary of \$500.00 per month and expenses plus 5 per cent of the net profits (R. 121, 122, 189, 368, 377) and oversee and keep harmony among the tenants.

Barr's first operation commenced on May 11, 1953, at which time he remained until June 5, 1953, and left to attend a fraud action brought against him by E. J. Welch, one of the beneficiaries in this case (R. 156, 209). After the taking of testimony for two days, he instructed his attorney, Horton Herman (R. 152), to negotiate a settlement, which is the basis for the bringing of this action (R. 155-158). The settlement was entered into on June 10, 1953, at which time Barr through his attorney, Horton Herman, produced the lease agreement which Barr had with Kofues and Kirschmer (R. 255), at which time he offered to assign his portion of the crop to the defendant Welch. After negotiations were had and at the request of his attorney, Horton Herman, the declaration of trust and assignment (R. 8, 15) was executed. The agreement provided that J. P. Tonkoff, then attorney for E. J. Welch, and Horton Herman, then attorney for the Barrs, would act as trustees and from the proceeds of the crop the following payments would be made:

J. P. Tonkoff	\$15,000.00
Horton Herman	\$10,000.00
E. J. and Viola Welch	\$27,500.00
Roland and Effie Charpentier ...	\$15,000.00
John W. Cramer	\$ 5,000.00
	<hr/>
	\$72,500.00

The declaration of trust and assignment also provided:

“* * * ; warrant that there is planted to crops on the above described farm property approximately 2800 acres and that the assignor's interest in said crop is free and clear from any encumbrance. The assignors herein agree to farm said lands in good farmerlike fashion and in accordance with the terms of the aforementioned lease, it being understood and agreed that the assignors are not guaranteeing any particular yield and shall not be liable for crop failure due to any failure beyond the control of the assignors.”

The assignment further provides that Barrs would receive from the gross sum of the crops \$15,000.00 to pay for the cost of harvesting (R. 10, 11).

Prior to the execution of the trust and assignment agreement on June 10, 1953, E. J. Welch, one of the beneficiaries named in the agreement, telephoned Margaret Stevenson, the wife of J. C. Stevenson, Jr., who was then living on the ranch (R. 128, 129) to inquire as to the condition of the crops, and was advised by Mrs. Stevenson that the crops were in very good condition (R. 132, 527). J. C. Stevenson, Sr. and Jr. corroborate Margaret Stevenson that the condition of the crops was very good on June 10, 1953 (R. 65, 105, 330, 331). Pursuant to receiving this information the declaration of trust and assignment agreements were executed (R. 142). Clay Barr, prior to the execution of the agreements, also represented that the crops were in good condition and that the prospects were that the proceeds from the crops would amount to \$250,000.00 or \$300,000.00 (R. 143, 471).

On or about the 2nd day of July, E. J. Welch inspected the crops on the ranch and observed that the grain was "burning up" due to lack of irrigation. He immediately came to Yakima, Washington, the residence of J. P. Tonkoff, and so informed him, at which time Tonkoff contacted Horton Herman in Spokane (R. 143) and Herman advised Barr that the ranch needed irrigation (R. 213, 450, 465). Arrangements were made for Barr, Welch and Tonkoff to inspect the ranch immediately, and they did inspect the ranch on Friday, the 3rd day of July, 1953 (R. 126, 144, 214, 215). It was apparent that the crops were in dire need of irrigation and Barr agreed to put a crew on the ranch the following Monday (R. 107, 219), and irrigate. Tonkoff and Welch then left the ranch, leaving Barr there, but on the following day he left and never returned until the 15th of July (R. 107, 259, 260), at which time Stevenson, Jr. and one Perry Morter, one of Barr's employees, had started to irrigate in spite of Barr's absence. Upon arriving at the ranch on July 15th Barr ordered them to cease irrigating (R. 291, 311), even though there was an abundance of water with which to irrigate and one-half mile of irrigation sprinklers which were used for the purpose of irrigating by James C. Stevenson, Sr. (R. 347, 351, 382). Barr, according to his own testimony, remained away from the property from June 20th to August 8th except for two days around the 15th of July, and other witnesses testified they saw very little of Barr around the ranch (R. 115,

131, 508, 533). Barr admitted he was absent from the Meiss Ranch while he was harvesting his own 2300 acre grain farm located in Northern Oregon (R. 210, 249).

Barr was a dry-land farmer and at the time he leased the premises from Kofues and Kirschmer and thereafter during the growing season at Barr's request (R. 66) both Stevensons advised him (R. 119) concerning the planting and particularly that it was necessary to irrigate crops in that area (R. 65, 86, 87). He was advised that there was ample water for irrigation (R. 67, 73) and Barr admits this fact (R. 282), and that Mr. Stevenson had successfully and easily irrigated the ranch (R. 88, 89). Shortly before harvest, Tonkoff, Welch, Charpentier and James C. Stevenson, Jr. inspected the crops and discovered that they were seriously damaged. They took moving pictures (R. 148) of the condition of the ground and the crops, which moving pictures exactly show the condition of the ground and crops starting from the south part of the ranch going to the west (R. 116), then to the north and east. On the southeast side a green area appears (R. 82), constituting approximately 300 acres which were planted to rye, all of which crop had been choked out (R. 67) by weeds, and as a consequence (R. 232) defendant Barr plowed under approximately 200 acres of this grain during the growing season (R. 67, 68, 91, 109, 110, 148, 220, 248, 303, 319).

The evidence is uncontroverted that it is customary

and necessary (R. 67, 151) to spray the weeds when they appear in the grain crop during the latter part of June or the first part of July. Barr was so advised by the Stevensons (R. 201) and agreed to spray the weeds (R. 67), but failed to do so (R. 199), and it was so admitted during the course of trial by opposing counsel (R. 320). Barr had observed the weeds when he had returned from Spokane on June 10th (R. 210), and had discussed this with one Lester Liston, a spray firm doing business in that area, about the 3rd day of July, 1953 (R. 170, 204), at which time the weeds had so overtaken the crops that to spray would have been useless and ineffective (R. 171, 176, 178). In order to procure an effective kill of weeds, spraying must be done when the weeds are small (R. 175), and the spraying for weeds was generally done about June 10th (R. 173). Upon inspection and in the moving pictures the ground appeared extremely dry and contained cracks 1-4 inches in width and in some places 20-30 feet in length (R. 66, 116). The grain was very thin and dried up due to the lack of moisture and was prevented from developing (R. 90, 91, 536) and was 4-8 inches in height in the dry areas (R. 110, 148). Where the crops were exposed to moisture, chiefly along the ditch banks, they stood waist high (R. 108, 148, 171). In the extremely dry areas, there were practically no crops of grain (R. 126, 130, 131, 134, 138, 144) and in other dry areas the crops were dwarfed (R. 263). Kofues, part owner, and Kirschmer, part owner and an experienced grain

farmer (R. 359), visited the ranch the first part of September, and discovered that the crops were very poor, weedy and dry (R. 378, 379, 401, 432). They were dissatisfied with the quality and quantity (R. 385). Both expected a larger crop and believed that the property could produce a \$300,000.00 crop (R. 402, 433).

Resident farmers, Richard Ratliff, Clarence Enloe, Mary E. Noakes and James H. Noakes, testified on the part of the plaintiff that in July of 1953 the soil on this ranch was very dry and contained large cracks (R. 317, 494, 500, 512, 517, 528, 535); that the soil on this ranch is rich (R. 524, 531) and productive (R. 498). They further testified that it was customary and necessary to spray for weeds (R. 512) when they appear (R. 401, 492, 513, 530); otherwise, the weeds would overcome and choke out the grain (R. 518), and that the land was not cultivated in a good and farmerlike manner (R. 69, 72, 118, 402) consistent with the standards in the vicinity (R. 494, 534), even though 1953 was one of the best growing seasons that the area had had since 1947 (R. 64, 85, 137), chiefly because there was no frost that year (R. 442, 516), at which time Stevenson, Sr. produced almost an \$800,000.00 crop upon the property (R. 347). Had the property been properly cultivated, farmed and harvested, it would have produced a normal crop in the following amounts (R. 111, 112):

Wheat ... 2,500 lbs. per acre	132 acres at \$3.15 per 100 lbs.	\$ 10,395.00
Oats 2,000 lbs. per acre	1,085 acres at 2.30 per 100 lbs.	49,910.00
Rye 1,200 lbs. per acre	250 acres at 1.90 per 100 lbs.	5,700.00
Barley ... 3,000 lbs. per acre	1,200 acres at 3.10 per 100 lbs.	111,600.00
(R. 63, 72, 137, 151, 493, 517)	(R. 106)	(R. 117, 118)

James C. Stevenson, Sr. testified that he grew barley on the ranch waist high and oats shoulder high (R. 64). He further testified that "a very sloppy job of harvesting" was done, because the harvesters were driven too rapidly, causing the grain to be pushed over and not cut, resulting in much of the grain being left in the fields, so much so that when he turned in his cattle for pasture, two of his cows bloated and perished. When the cows were cut open, they were found to be "plumb full of grain" (R. 69, 113). He estimated that 400-500 pounds of grain per acre were left unharvested and scattered in the fields, which would amount to 1,066,800 pounds. Calculating the waste upon the price of oats, it would amount to \$20,269.20 (R. 70, 114, 149, 153, 230). In this area the ducks and geese come in from the north around the middle of September. The crops were ready for harvesting the first part of September, but Barr failed to harvest until the middle of September (R. 94), and as a consequence the wild fowl destroyed about 70 acres of grain (R. 113, 150).

Part of the grain was hauled to Macdoel and some was taken to a warehouse at Merrill. The ranch is situated about 5 miles from the macadamized highway. The grain was hauled in trucks without tarps, in such a manner that it was scattered along the dirt road to the main highway and in some places 1-2 inches in depth (R. 115, 150, 236, 293, 298, 313, 332). The defendant Barr admits that he returned to the Meiss Ranch shortly after June 10th, 1953 (R. 209), stayed

until June 20th, at which time he went back to his northern Oregon ranch and harvested his crops and returned to the Meiss Ranch for two days with Tonkoff and Welch on the 1st of July, and then immediately departed and went back to his Oregon ranch and returned to the Meiss Ranch on about July 15th, 1953, stayed a day and returned to his ranch in northern Oregon until August 8th (R. 210, 272). He then returned to the Meiss Ranch and stayed until September 8th, during which interim he went to Denver, Spokane, Sacramento, and to his northern Oregon ranch (R. 273). Obviously, he failed to devote any of his time to the growing and harvesting of the crops, but operated the ranch through Perry Morter, a 19-year old cousin, by telephone conversations (R. 321) from his northern Oregon ranch. Prior to 1953 Barr had purchased from Kirschmer a certain grain elevator in Colorado, upon which purchase Barr owed Kirschmer \$100,000.00, payable in \$15,000.00 installments the first part of January. In October of 1953 when he was aware that litigation would arise as a consequence of his farming the Meiss Ranch, he voluntarily made an assignment of the \$15,000.00 which he was to receive as harvesting costs to Mr. Kirschmer (R. 245). When the payment was due in the following January, Barr paid the \$15,000.00 installment and Mr. Kirschmer testified by deposition that he had no interest whatever in the \$15,000.00 which was assigned to him and which was a part of the proceeds of the crop, and that he didn't want to

have anything to do with the litigation. Barr testified during the course of the trial that he had sold his lease on the Meiss ranch (R. 275) to the Farnam Bros. for the sum of \$35,000.00 (R. 281).

On the 15th day of September, 1953, prior to the time this suit was instituted, but obvious to Barr that it would be, Barr told James C. Stevenson, Jr. that if he would stay out of the litigation which was about to occur, he would show Stevenson how to get his \$15,000.00 (R. 347) from Kofues and Kirschmer. At this time no one had any knowledge that the ranch had been sold to the Farnam Bros., and by prior agreement Stevenson was to receive a percentage for the sale of the ranch as a commission. Barr admits that there was some talk about \$15,000.00, but denies that he offered any bribe to Stevenson, Jr. (R. 355).

After hearing the witnesses and considering the exhibits and depositions, the trial court took the matter under advisement and subsequently handed down its memorandum decision (R. 37) which reads as follows:

“Granting plaintiffs complete sincerity, I cannot accept their view of the controlling facts of the case. Landowner Kirschmer exonerates defendant and I do the same. One of plaintiffs’ leading witnesses had an obvious interest in exculpating himself, another in paying off an old grudge.

“The case has been hard fought, and the parties no doubt will desire to appeal. Will the attorneys please submit orders that will clean the record, so that all of the difficult questions that have been raised during the long drawn out proceedings may be properly presented to the Court of Appeals.

“No personal judgment for costs.”

The trial court failed to consider the fact that Kirschmer, as shown by the records, was actually not qualified to speak as to the farming operations during the year 1953, because admittedly he was not present to determine whether the weed condition was such that they could and should have been eradicated, and also he was not present to determine the need for irrigation. Furthermore, defendant Barr was indebted to Kirschmer in the sum of \$38,000.00. Also, the trial court failed to give due consideration to the overwhelming disinterested testimony which sustains plaintiff's position.

Even the honorable trial court recognized the case could be appealed and that it was for the Court of Appeals to pass final judgment (R. 37).

SPECIFICATIONS OF ERROR

I.

The trial court erred in Paragraph II of its Findings of Fact in finding that the management contract of J. C. Stevenson, Jr. remained in effect through the 1953 harvest season, and that it had any bearing whatsoever in the controversy between the plaintiff J. P. Tonkoff and the defendants Clay Barr and wife, because the evidence conclusively demonstrates that J. C. Stevenson, Jr. had no control over the defendant Barr in the manner of operating the ranch.

II.

The trial court erred in Paragraph X, sub-section a) of its Findings of Fact in finding as a fact that the

defendants Clay Barr and wife did not make any false or untrue warranties with respect to the acreage of growing crops on the Meiss Ranch because the evidence, without contradiction, demonstrates that the defendants Barr did not have 2800 acres planted in crops but had substantially less.

III.

The trial court erred in failing to find that the defendants Clay Barr and wife made false or untrue warranties with respect to the acreage of growing crops because the evidence clearly and convincingly shows that the defendants Barr did not have 2800 acres planted but that the amount was substantially less.

IV.

The trial court erred in Paragraph X, sub-section (b) of its Findings of Fact in finding as a fact that the defendants Clay Barr and wife did not fail, refuse or neglect to farm the Meiss Ranch in a good and farmer-like fashion, because the evidence overwhelmingly and convincingly demonstrates that the defendants Clay Barr and wife failed to properly eradicate weeds, irrigate and harvest the crops.

V.

The trial court erred in failing to find as a matter of fact that the defendants Barr failed and refused or neglected to farm the Meiss Ranch in a good and farmer-like fashion in that the evidence convincingly demonstrates that the defendants Barr failed to eradicate

weeds, failed to irrigate and failed to properly harvest the crops, all to the plaintiff's damage.

VI.

The trial court erred in Paragraph X, sub-section (c) of its Findings of Fact in finding as a fact that the defendants Clay Barr and wife did not breach or fail to perform any covenants, provisions or conditions of the assignment dated the 10th day of June, 1953, or any subsequent promise or agreement, because the evidence convincingly demonstrates that the defendants Clay Barr and wife failed to have planted in crop the amount of acreage which they warranted, they failed to properly erradicate weeds which choked out the crop, they failed to irrigate which resulted in a substantial portion of the crop burning up, and they failed to harvest properly in that excessive amounts of grain were left lying on the field and in the road.

VII.

The trial court erred in failing to find as a fact that the defendants Clay Barr and wife breached and failed to perform their convenants, provisions and conditions of the assignment dated the 10th day of June, 1953 and subsequent promises and agreements because the evidence convincingly demonstrates that the defendants failed to have the amount of acreage planted in crops that they warranted, they failed to properly irrigate the premises, they failed to erradicate weeds, they failed to properly harvest with the result that a sub-

stantial amount of grain was left on the field and in the roadway.

VIII.

The trial court erred in Paragraph II of its Conclusions of Law in concluding that plaintiff is not entitled to judgment against defendants Clay Barr and wife for the amount prayed for in plaintiff's complaint, in that the facts upon which said conclusion is based are not sustained by the record.

IX.

The trial court erred in entering judgment for the defendants and appellees, Clay Barr and wife, and against the plaintiff.

X.

The trial court erred in failing to enter judgment in favor of plaintiff and against defendants Clay Barr and wife for the sum of \$72,500.00 with interest thereon from the 15th day of November, 1953 until paid, at the rate of 6 per cent.

ARGUMENT

I.

THE TRIAL COURT ERRED IN PARAGRAPH II OF ITS FINDINGS OF FACT IN FINDING THAT THE MANAGEMENT CONTRACT BETWEEN KIRSCHMER AND KOFUES AND J. C. STEVENSON, JR. REMAINED IN EFFECT THROUGHOUT THE 1953 HARVEST SEASON.

The appellant by his first specification of error complains of the trial court's finding as a matter of fact that the management contract between Kirschmer and Kofues, owners of the property involved, and J. C. Stevenson, Jr., remained in effect throughout the 1953 harvest season. The reason for challenging this finding of fact is because of the implications or inferences that might be drawn therefrom. Any inference or implication that J. C. Stevenson, Jr. had any authority over the defendant Barr relative to the growing, caring for and harvesting of the crops involved is absolutely contrary to the evidence. Kirschmer, one of the owners of the property, when he leased the same to the defendant Barr, stated that J. C. Stevenson, Jr., commonly known as Bud, then became an employee of Clay Barr (R. 77). Even the defendant Clay Barr testified that Stevenson, Jr. felt that he had been knocked out of a good job (R. 190). The attempt on the part of the defendant Barr to make it appear by his testimony that J. C. Stevenson, Jr. was in control (R. 191) is absolutely contrary to all of the facts in this record. There

is absolutely no evidence in this record that J. C. Stevenson, Jr. at any time directed the defendant Barr as to what to do and how to do it. The defendant Barr can point to no document which put J. C. Stevenson, Jr. in charge of the defendant Barr (R. 266). J. C. Stevenson, Jr., himself, at no place in this record contended that he had any jurisdiction over Mr. Barr to the extent of telling Mr. Barr how to properly take care of or harvest the crop involved. As a matter of fact Barr admitted he had full control (R. 266, 267).

As a matter of fact the covenant and agreement between Kirschmer and Kofues (Dft. Ex. 14) shows upon its face that the defendant Barr agreed to farm the ranch in a farmerlike manner. This same language is used in the agreement and assignment (Pltf. Ex. 5) made between the defendant Barr and Tonkoff and Herman as trustees.

If the purpose of the finding of the trial court herein complained of is to exculpate the defendant Barr from farming the property in a farmerlike manner, then such a finding is not sustained by any evidence in this record and is clearly erroneous. Furthermore, such a finding would not relieve the defendant Barr from his obligation to perform the covenants of his agreement (Pltf. Ex. 5).

II.

THE TRIAL COURT ERRED IN PARAGRAPH X, SUBSECTION (a) OF ITS FINDINGS OF FACT IN FINDING THAT THE DEFENDANTS BARR DID NOT MAKE ANY FALSE OR UNTRUE WARRANTY WITH RESPECT TO THE ACREAGE OF GROWING CROPS ON THE MEISS RANCH.

Specifications of Error No. II and III are directed to this finding of the trial court, which finding is clearly erroneous.

Plaintiff's Exhibit 5 provides as follows:

“* * *, Clay Barr and Betty Barr, * * *; and warrant that there is planted to crop on the above-described farm property approximately 2800 acres;”

This warranty is signed by Clay Barr and Betty Barr and directed to the plaintiff in this action. The defendant Barr admitted that he made representations as to the amount of acreage (R. 253, 254). The defendant Barr testified that he was only making a guess or estimation as to how much grain was planted (R. 244) and admitted further that he did not know in fact how many acres of grain there were in the various crops (R. 245). Certainly the defendant Barr, of all people, was in a better position to know how much acreage had been planted than anyone else and particularly the plaintiff in this case and his beneficiaries. There is absolutely no evidence in this record by the defendant Barr as to the exact amount of acreage that he planted in each of the named grains. Contrasted with the de-

fendant Barr's failure to specify the amount of acreage he had planted in each of the named grains, we have the testimony of Mr. J. C. Stevenson, Sr., that there were 2500 acres planted in oats, wheat, barley and rye (R. 96). We also have the testimony of Mr. E. J. Welch that there were between 2500 and 2600 acres that were actually planted in grain (R. 156). We also have the testimony of Mr. Frank Kofues, sometimes called Hofues, one of the owners and signatories to the lease agreements (Dft: Ex. 14) that there were 2500 acres planted (R. 442). In addition, we also have the testimony of J. C. Stevenson, Jr. that there were 250 acres of rye, 1200 acres of barley, 132 acres of wheat, and 1086 acres of oats, or a total of 2668 acres actually planted (R. 106).

Thus, the appellant in the trial court introduced evidence that the defendant Barr was short at least 132 acres, contrary to his warranty, and at the most 300 acres from his warranty. This, we submit, shows that the representations made by the defendant Barr were materially false. The materiality of these representations becomes apparent when it is considered that this land was capable of producing and had in the past produced approximately 50 bushels per acre of various grains, which on the open market would be equivalent to \$100.00 or more. A shortage of 132 acres would amount to \$13,200.00, while a shortage of 300 acres would amount to \$30,000.00.

We submit that the trial court's finding is not sus-

ained by the evidence, but is actually contrary to the evidence, and the trial court erred in not finding as a fact that the defendant Barr had made a false and untrue warranty with respect to the amount of acreage of growing crops on the Meiss Ranch.

III.

THE TRIAL COURT ERRED IN FINDING AS A FACT THAT THE DEFENDANTS DID NOT BREACH OR FAIL TO PERFORM ANY COVENANT, PROVISION OR CONDITION OF THE ASSIGNMENT OF JUNE 10, 1953 (Ex. 5).

Under this heading will be covered Specifications of Error Nos. IV through IX because all of these specifications of error from an evidential standpoint are so closely interwoven.

In order to assist the Appellate Court, an Appendix has been prepared and attached to this brief in the form of a chart covering what appellants believe to be the salient testimony of each witness concerning the primary issues involved relative to the actual farming operation.

THE LAW:

The issues presented by this appeal are factual. The only two points of law in which the court may be interested are:

(1) What is meant by the words, "the assignors herein agree to farm said lands in a good and farmer-like fashion and in accordance with the terms of the aforementioned lease * * *," which are contained in

Ex. 5 and which the defendant Barr was bound to perform.

The words, "farmerlike fashion," are defined in Vol. 25, C. J., pg. 674, as follows:

"A workmanlike manner; as good farmers usually do."

We believe that they would also mean the same as "husbandlike and proper manner" which are defined as follows:

"A term meaning according to the course of farm cultivation and management in that part of the country where the premises are situate." See 42, C. J. S., pg. 364.

(2) What showing must be made upon appeal to reverse the Findings of Fact of the trial court? This court is undoubtedly familiar with the case of *United States v. Oregon State Medical Society*, 343 U. S. 326, 96 Law Ed. 978 where the Supreme Court of the United States, in referring to Rule 52 of the Federal Rules of Civil Procedure, said:

"A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been made."

BACKGROUND:

The case at bar stems out of a fraud action against the defendant Barr (R. 251) which, at his insistence, (R. 251) he settled for the sum of \$72,500.00 by executing Ex. 5. At the time of this settlement, according to the witness Welch, who is a beneficiary under Ex. 5, the defendant represented the potential value of the

crops to be \$250,000.00 to \$300,000.00 (R. 143). Barr denied this (R. 255) and claimed he only represented as to the amount of acreage (R. 253) which we have heretofore demonstrated was wrong and false. Barr's denial is incredible, especially when he was the one who had just returned to Spokane from the ranch (R. 251) and, of all people, was the only one who at least in the negotiations knew or should have known how many acres of grain had been planted and what the potential prospects of the crop for the 1953 season would be. It should appear obvious to this court that no one in his right mind would settle a lawsuit for the sum of \$72,500.00 as a party plaintiff upon the wild speculation of what an alleged (but proven false) 2800 acre grain ranch would potentially produce. This court knows from experience that the productivity of grain land varies considerably and unless it has substantial productivity the crop might not even make expenses. Furthermore, defendant Barr was only entitled to one-half of the crop in accordance with defendants' Ex. 14. In addition to this, in accordance with Ex. 5, the defendant Barr was entitled to \$15,000.00 off the top for harvesting expenses. It thus becomes quite apparent that in order to pay the sum of \$72,500.00 in accordance with Ex. 5 and also the sum of \$15,000.00 for harvesting expenses, that the minimum crop to be produced would have to be at least \$175,000.00. Again, it should be pointed out that if the defendant Barr had no hopes, expectations or possibilities of producing a crop that

would bring \$175,000.00, why was the provision put in Ex. 5, Paragraph 1, sub-section (b), whereby Barr was to receive the warehouse receipts for any crops not sold.

The testimony of Welch relative to the representations as to the amount in dollars and cents that the land would produce is corroborated by the testimony of Kirschmer, one of the owners of the ranch, who testified that the crops should have brought \$250,000.00 (R. 402) or \$300,000.00 (R. 410), but instead something went wrong.

The defendant Barr had gone into the Meiss Ranch under the lease agreement, Ex. 14, about the 7th of May, 1953. Undoubtedly Mr. Barr worked hard and diligently up to about the 7th of June, 1953 when he went to Spokane as a party to the fraud suit. At that time Mr. Barr had the acreage planted although it was not the 2800 acres that he represented. We also believe that a reasonable person would have the right to rely upon Mr. Barr's representations contained in Ex. 5 that the acreage was "planted to crops" meant just what it said and that if the crop, or any part thereof, had been improperly planted he should have so stated at that time.

FARMING OPERATIONS AFTER EXECUTION OF EXHIBIT 5:

The defendant Barr returned, according to his testimony, to the Meiss Ranch immediately after June 10, 1953 when Ex. 5 was executed. We believe that this is an instance where a person's intentions, if they can be

ascertained, paint the true and correct picture of what he did or failed to do in its proper light. In this case, Mr. Barr not only once but twice, definitely stated, "I had no intention, I say, of paying that \$72,500.00 equity which you were claiming in that crop," (R. 261). Certainly the time should come when Mr. Barr should be required to obey the principles of fair and honest dealing. However, insofar as the record in this case is concerned, we shall endeavor to convince this court that Mr. Barr carried out his intention of not paying the \$72,500.00.

CONDITION OF CROP JUNE 10, 1953:

The overwhelming evidence in this case shows that the condition of the crops on the 10th of June to the middle of June, 1953 was very good (R. 65, 105, 129, 527). Even Barr admitted that the crops looked pretty fair around the 10th to the 15th of June, 1953 (R. 212) with the exception of those on the adobe ground (R. 212). As for general growing conditions for the year 1953 and in the area of the Meiss Ranch, as compared with prior years they were very good (R. 64, 136, 442, 491, 503, 510). As a matter of fact the growing year of 1953 was comparable with the year 1947 (R. 64) when this land produced almost an \$800,000.00 crop (R. 352).

WEEDS AND THE NECESSITY OF SPRAYING:

Weeds, which can ruin a grain crop, began showing their unsightly heads in the month of May, 1953 (R. 318). As a matter of fact, Mr. Liston, an aerial crop

duster called as a witness by the defendant, testified that there were quite a number of weeds there on May 15, 1953 (R. 177). Mr. Liston was out soliciting business, but did not get any. Furthermore, the weeds on May 15, 1953 were from 1 to 1½ inches tall, according to Mr. Liston (R. 177). As a matter of fact, Mr. Kofues testified that at the start of the season a large part of the land was grown up in weeds (R. 432).

In the area of the Meiss Ranch it is customary to spray for weeds (R. 110, 151, 494, 512, 514, 517, 531).

We are not talking about a small weed patch, but to the contrary an extensive amount of weeds and weed patches. They were awfully thick (R. 67). One witness estimated from 150 to 200 acres in weeds (R. 519). Another witness estimated 200 acres (R. 513) while another said a couple hundred acres (R. 493). Several witnesses estimated between 300 and 400 acres in weeds (R. 531) and another witness estimated 300 acres in weeds (R. 109). These weeds simply took over (R. 530, 268, 379, 385, 438, 503).

Mr. Stevenson, Sr. advised Mr. Barr to spray (R. 67) but Barr did not follow his advice (R. 73) and Mr. Barr admitted that Mr. Stevenson, Sr. recommended spraying (R. 201). Mr. Barr's own witness, Mr. Liston the aerial crop duster, when called by Mr. Barr on about July 2nd or 3rd, 1953 to look the field over with regard to spraying, said that he did and at that time the weeds were too big to spray (R. 171) and he so advised Mr. Barr (R. 172). Mr. Liston further stated

that most of the spraying done in that area is done between June 10th and up to the middle of July. The only reason he did not spray was that he was not asked to do so prior to July 2nd (R. 176) and then it was too late and as a result, no spraying was done (R. 402, 541, 530, 7, 148). As a matter of fact, it was admitted in open court by the defendants' counsel that there never was any effort at weed control (R. 320).

Mr. Kirschmer, one of the owners of the ranch, stated that a good farmerlike manner would mean spraying for grass when you found the weeds coming up through the grain (R. 402). This defendant Barr utterly failed to do, notwithstanding advice from Mr. Stevenson, Sr. What excuse does he have to offer? Frankly, we can find no legitimate excuse except Mr. Barr's complete indifference to the operation of the ranch. Of course, he had no intention of paying this \$72,500.00 obligation. Mr. Barr's own expert, namely Mr. Liston the crop duster, did not testify that the weeds could not have been effectively sprayed between the period that he visited the ranch on May 15th and his subsequent visit on July 2, 1953, because obviously there was a period of time when the weeds could have been sprayed effectively. Instead, several hundreds of acres of crops were lost and this is a substantial loss when it is considered from a dollars and cents production standpoint that this land is capable of producing, and would have produced, at least \$100.00 per acre.

Moving pictures were introduced in evidence (Pltf.

Ex. 11), showing the vast extensiveness of the weeds that took over and choked out a considerable portion of the crop. These pictures bear mute but very descriptive evidence of the defendant Barr's indifference and failure to farm this grain crop in a farmerlike manner in accordance with the customs and the practices of that area, as well as the necessities which common sense would have dictated.

EXPERIENCE AND COMPETENCY OF HELP:

According to Mr. Barr, when he left Spokane on or about the 10th day of June, 1953 he returned to the ranch and stayed there until June 20, 1953 (R. 209). He then returned to his own 2300 acre ranch approximately 500 miles to the north in the State of Oregon where he remained until he received a call about July 1st complaining not only of the failure to spray, but of the failure to irrigate (R. 213, 259). He was then brought down to the ranch and shown the conditions that existed there with regard to the crop drying up. He then left the ranch and returned to his ranch in the northern part of Oregon (R. 263). He then again returned to the Meiss Ranch around the 12th to the 15th of July, 1953. He remained a day or two and then returned to his ranch in the northern part of Oregon and stayed there until about the 7th or 8th of August (R. 210, 272) at which time he returned to the Meiss Ranch. The amount of time that Mr. Barr spent at the Meiss Ranch is disputed by a number of witnesses who were on the ranch practically every day throughout the

ason (R. 106, 131, 508, 533). In any event, it appears from this record that Mr. Barr left no one at the ranch on his behalf between the 20th of June, 1953 and the 20th or 15th of July, 1953 (R. 310) at which time he brought his young cousin, Perry Morter, down to the ranch. Perry Morter, at that time, was 19 years of age (R. 308). He had worked for the Barrs (R. 308) but he had never had any experience handling irrigation before (R. 315, 316). Yet this is the young man that the defendant Barr brought back to the ranch on either the 20th or 15th of July, 1953 and left in charge of the irrigation of these crops (R. 218, 219). Any one who has ever had any farming experience, particularly with irrigation, knows that irrigation type farming is a specialty and you do not become an irrigator over night. You must learn how to handle water and the multitude of things that go with irrigation farming. Yet, here we find the defendant Barr leaving a young man completely inexperienced, in charge of irrigating this large farming operation. To us this is like a surgeon leaving the patient on the operating table and calling in a first-year medical student to take over and do an appendectomy while the surgeon leaves for another job. It demonstrates utter and total indifference and not the standards of an ordinary reasonable and prudent person or farmer who is attempting to do his work in a good and farmerlike manner. This indifference possibly explained by the defendant Barr's attitude, because as we have heretofore pointed out, he had no intention of paying the \$72,500.00.

IRRIGATION WAS NECESSARY:

In the area of the Meiss Ranch and on the Meiss Ranch, irrigation is necessary (R. 512, 517). You simply do not grow crops in that area without irrigation (R. 512). If you do not irrigate, the crops will dry out (R. 65). Now Mr. Barr testified that he left the ranch on June 20, 1953 (R. 209). Whether he left sooner we cannot positively say, but in any event, the condition of the crops from the lack of moisture was so bad by July 1st that Mr. Barr was contacted and advised to come to the ranch at once (R. 213). He flew to the ranch with Mr. Tonkoff and others (R. 259). He admitted that he received this call about July 1st regarding the property needing irrigation (R. 213) and the complaint was made at the ranch about the irrigation (R. 262), and Mr. Barr knew that you couldn't grow crops without irrigation (R. 269). The new ground was dry and cracked (R. 215) and the crop was small and stunted (R. 262). He further admitted that in the area where the grain was planted and the ground was cracked that the grain did not get enough moisture (R. 277). The condition on July 1st was so bad that Mr. Stevenson called Mr. Kirschmer about the crops not being properly irrigated (R. 439). Mr. Kirschmer admitted this (R. 404) and Mr. Kirschmer thereupon called Barr concerning the matter of irrigation (R. 404). On the other hand, Mr. Barr claims that he called Mr. Kirschmer relative to irrigation (R. 283). In any event, the land was drying up and cracking and the

crop was burning up. One witness said there were cracks from $1\frac{1}{2}$ to $11\frac{1}{2}$ inches wide and from 1 to 10 feet long (R. 528, 529). Another witness said that there were cracks 3 inches wide (R. 490). Another witness said the cracks averaged from 1 inch to 3 or 4 inches wide and in some places were 20 to 30 feet long (R. 26). As far as the crop was concerned, some of it was only 4 inches to 1 foot high (R. 71). The evidence is just simply overwhelming that the crop was burning up from the lack of moisture and the defendant Barr nowhere has denied this. Mr. Stevenson, Sr. advised Mr. Barr on how to irrigate (R. 86) and that the crops could have been irrigated (R. 88). Did Mr. Barr take any immediate steps to prevent this crop from burning up from the lack of moisture? The answer is a definite "no." On July 1st when Mr. Barr was brought to the ranch by Mr. Tonkoff, Mr. Barr promised Mr. Stevenson, Jr. (R. 107) and also Mr. Welch (R. 144) that he (Barr) would be down with a crew the following Monday to begin irrigating. Barr never showed up for about three weeks (R. 107). When Mr. Barr did finally show up, he brought with him his young cousin, who was entirely and utterly inexperienced in irrigation farming. There never was any irrigation done except for one or two days' experimental work and then Barr ordered the water to be turned off (R. 269, 311). There is absolutely no reason why crops should have been allowed to burn up. It was simply a matter of Barr's indifference to the whole operation. The overwhelming

weight of the evidence, without controversy, is that there was an abundance of water available not only from the lake, but also from wells upon the property (R. 65, 93, 103, 108, 211, 375, 495, 512, 518, 529, 536) and for those places where the land was not exactly level there was available a portable sprinkling irrigation system which was $\frac{1}{2}$ mile long (R. 347, 382, 529) and there were ditches for irrigation purposes (R. 500).

When crops are burning up from the lack of moisture and where irrigation facilities are available such as they were on the Meiss Ranch, it is the duty and obligation of any farmer who is farming in a good and farmerlike manner to immediately take steps to get water on the crop. Conditions such as are disclosed in this record that existed on the 1st day of July, 1953 relative to the lack of moisture to the crops, required immediate attention. The defendant Barr by his own evidence has clearly demonstrated that he did not give these crops his immediate attention and as a result, a substantial portion of the crops that otherwise would have been harvested was lost because of his inaction and neglect.

The moving pictures (Pltf. Ex. 11), will vividly portray the cracks in the earth and the dryness of the ground, as well as the stunted crops from the lack of moisture. These pictures tell a story more vivid than the printed page.

THE ACRES OF LAND THAT DEFENDANT BARR PLOWED UP THAT WERE IN CROPS:

The defendant Barr admits that he plowed up crops without anybody's consent or authority. He did this, as he says, to prevent wild oats and things from growing (R. 202) and he plowed the oats under because they were so thin and the weeds were so bad (R. 242) and that was the proper thing to do.

It undoubtedly would be good farming practice to plow up a patch of weeds and also to plow to prevent wild oats from growing. However, as it has heretofore been demonstrated, the only reason weeds were growing was because the defendant Barr failed to spray. And the only reason the oats were thin was because the defendant Barr failed to irrigate. The defendant Barr says that he only plowed up about 100 acres (R. 220). Mr. Stevenson, Sr. says 200 acres (R. 82). Mr. Welch said 200 acres (R. 148). On the other hand Mr. Stevenson, Jr. said he plowed up 100 acres and then some other parts of the field (R. 106). In any event, at the rate of \$100.00 per acre, no less than \$10,000.00 was lost by reason of this plowing under. This acreage that was plowed under is far short of all the damage caused by weeds, as well as the damage caused by the failure to irrigate. The moving picture films will demonstrate this.

BARR DID NOT FARM THE LANDS AND CROPS IN A GOOD AND FARMERLIKE FASHION:

We believe that what we have heretofore shown in

this brief and by our reference to the actual testimony adduced at the trial, that the question of whether Mr. Barr farmed the crops and lands in controversy in a good and farmerlike manner has already been answered in the negative. However, Mr. J. C. Stevenson, Sr. said that Mr. Barr did not farm in a good and farmerlike manner but he did so in a very slipshod manner (R. 72). Mr. J. C. Stevenson, Jr. said the same thing (R. 118). Mr. Barr admitted that it wasn't his original intention when he took the lease to be operating two ranches so far apart, but that is what happened and he couldn't get down to the Meiss Ranch all of the time (R. 265). This, of course, is no excuse for his breach of agreement. Mr. Kirschmer, upon whom the trial court seems to have placed much weight, said that he didn't criticize the way Barr operated the ranch (R. 385) but he was not entirely satisfied with Barr's operation (R. 385) because he stated that some improvements might have been made. Further he stated that "it wasn't farmed right good" (R. 402). But the weight to be attached to Mr. Kirschmer's testimony must be determined by his ability to pass judgment from his actual knowledge of what took place during the 1953 season. Mr. Kirschmer himself admitted that he visited the ranch on May 1, 1953 (R. 370) and returned to the ranch early in September, 1953 (R. 377) and that he was not familiar with the country around the Meiss Ranch and had no farming experience in that area (R. 399) and he was not familiar with the different fields.

When we consider these factors, and in all fairness to Mr. Kirschmer as well as the trial court, how can much weight be placed upon Mr. Kirschmer's testimony when all of the things of which we are complaining took place during a period of time when Mr. Kirschmer was not present on the ranch and knew nothing of what was going on. Too, it must be remembered that Mr. Barr, the defendant, owes Mr. Kirschmer \$38,000.00 and Mr. Kirschmer undoubtedly hopes to get paid, but irrespective of this, how can Mr. Kirschmer's opinion or judgment outweigh the opinion and judgment of people who were actually present throughout the season and know whereof they speak?

Mr. John Ratliff, Jr., a disinterested witness who was on the ranch practically all of the time from April to November 1, 1953 (R. 527) and who was farming property on the Meiss Ranch and is thoroughly familiar with it, and basing his opinion on what he observed during that period of time, stated that the wheat crop was practically a total loss and that lack of water was the main cause (R. 532). He further stated that proper farming standards were not applied to the ranch, nor to the growing and cultivation of the crops (R. 534, 535) and that Barr neglected the crops (R. 535) and he told the same thing to Barr (R. 535).

Again, Mr. Clarence Enloe, another disinterested witness who is familiar with the Meiss Ranch (R. 489) and who was there during the year 1953, stated that the crops were not cultivated in a good and farmerlike

manner consistent with the standards of the vicinity (R. 494).

Mr. Kofues, one of the owners of the property, corroborated Stevenson when he testified that Stevenson called and complained about the property not being properly farmed in July or August (R. 438).

When one considers the evidence in this record dispassionately one cannot help but be convinced that defendant Barr did not perform his obligation to farm the Meiss Ranch and the growing crops thereon in a good and farmerlike manner.

CARELESSNESS IN HARVESTING CROPS:

We have pointed out the indifference of defendant Barr with regard to eradication of weeds and the utter lack of irrigation. This same indifference, we believe, is characteristic of the harvesting of the crops, with the additional factor that when harvesting began the defendant Barr had an additional reason for being indifferent—he had sold out his lessee's interest to the Farnam boys (R. 225) for \$35,000.00 (R. 281). This sale took place prior to the harvest and the only obligation that Barr had was to get the crop off. This unquestionably has a bearing upon the speed with which the crop was taken off the premises, speed that had the ultimate effect of a substantial loss in crop.

Mr. Stevenson, Sr., an extremely well qualified man and entirely disinterested, said that it was a sloppy job of harvesting (R. 69). He explained that the combines were operating at too fast a speed (R. 69) and that the

effect of such speed resulted in the kicking over of a lot of grain and also knocking a lot of small grain down so that it could not be cut (R. 69). He estimated that there were from 400 to 500 pounds of grain per acre left in the fields and windrows (R. 70); that as a matter of fact there was so much grain left that two of his cattle died because of bloat (R. 69). This had never occurred before (R. 69). In this Mr. Stevenson, Sr. was corroborated by Mr. Stevenson, Jr. (R. 113, 149) except that Mr. Stevenson, Jr. estimated there were between 500 and 600 pounds per acre left on the ground (R. 149).

Mr. Welch, another witness, estimated there were between 500 and 600 pounds per acre left on the ground (R. 149).

Mr. Barr himself said that he observed the operations and saw grain coming out onto the ground (R. 30).

Defendant Barr said there was not an excessive amount of waste (R. 229) and he is corroborated only by witnesses who are relatives of his and certainly not disinterested (R. 302, 313, 326).

The evidence further shows there was a considerable amount of grain on the highway between the ranch and warehouse (R. 115, 149, 313, 521). This was caused by driving the motor vehicles or trucks at too fast a rate of speed without any protection over the top of the grain and as a result of the wind or air pressure created by the speed of the vehicles without any protective cover-

ing, the grain blew off (R. 533). All of the witnesses agree that a tailgate had come off one dump truck and that a considerable amount of grain had been spilled on the highway (R. 115, 149, 236, 294, 313, 384). However, this did not explain all of the grain on the highway.

We believe the record shows that there was a very substantial loss of grain in the harvesting caused by defendant Barr's failure to harvest the crops in a farmerlike manner.

IV.

THE TRIAL COURT ERRED IN FAILING TO ENTER JUDGMENT IN FAVOR OF PLAINTIFF AND AGAINST DEFENDANTS.

We sincerely believe we have demonstrated that the trial court erred when it entered judgment in favor of defendants and appellees. We further submit that in view of the record in this case the plaintiff was entitled to judgment against defendants Clay Barr and wife for the sum of \$72,500.00 with interest thereon at the rate of 6 per cent per annum from the 15th day of November, 1953 until paid.

We do not believe that the defendants and appellees can point to any evidence in this record that would show that the crop involved could not have produced in excess of \$200,000.00 for the crop year 1953 in view of the prevailing market prices, and this is especially true when, as we have heretofore pointed out, it was estimated that the potential crop and productivity for the

year 1953 would be from \$250,000.00 to \$300,000.00. This estimate is entirely reasonable and not mere speculation when it is considered that the 1953 crop growing year was very good and comparable to the year 1947 when this same land produced \$800,000.00 in crops.

When consideration is given the very large amount of acreage taken by weeds with the resultant total loss of crop from that acreage, the amount of ground mowed under by defendant, the stunted growth of much of the grain caused by the lack of water and that lack of water and moisture has the effect of cutting down the weight of the grain, and the amount of grain left on the ground because of the slipshod manner of harvesting, it becomes quite obvious that because of the defendants' failure to farm this property in a farmer-like manner the plaintiff has suffered a very substantial loss and, as a matter of fact, has been damaged in the sum of the full \$72,500.00 which he was entitled to receive and which he had every right to expect to receive.

The total amount of the crop produced in dollars and cents was the sum of \$88,746.53 (R. 24) and of this sum the defendant Barr was entitled to receive one-half pursuant to his lease agreement with Kirschmer and Hofues (Ex. 14), namely the sum of \$44,373.28, which was deposited into the registry of the court (R. 26). From this sum was deducted the sum of \$15,000.00 for Barr's cost of harvesting pursuant to Ex. 5. This leaves a balance in the sum of \$29,373.28 less \$500.00 (R. 38,

45) which the plaintiff ultimately received in December, 1955. Thus, the plaintiff should now have judgment against the defendants and appellees for the difference between \$72,500.00 and \$29,373.28, or the sum of \$43,126.72.

In addition to this amount the plaintiff should have interest at the rate of 6 per cent per annum on the entire amount of \$72,500.00 from the 15th day of November, 1953, when according to the terms of Ex. 5 the sum was payable, to the 8th day of December, 1955, and should have interest at the rate of 6 per cent per annum on \$43,126.72 from the 8th day of December, 1955 until judgment is rendered by this honorable court.

We believe the plaintiff and appellant is entitled to interest because the amount to which plaintiff is entitled is a liquidated sum and payable on a day certain. It was not so paid.

CONCLUSION

It is respectfully submitted that the judgment of the trial court should be set aside and reversed and that judgment be entered for appellant in accordance with the amounts set forth in Paragraph IV of this brief, after giving the defendant Barr credit for \$29,373.28.

Respectfully submitted,

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FERTIG & COLOMBO,
Attorneys for Appellant

United States
Court of Appeals
For the Ninth Circuit

P. TONKOFF, individually, and J. P. TONKOFF, as Trustee
of E. J. Welch and Viola Welch, husband and wife, Roland
P. Charpentier and Effie Charpentier, husband and wife,
and John W. Cramer,

Appellant,

vs.

LAY BARR and BETTY BARR, husband and wife,

Appellees.

Appellees' Brief

Appeal from the United States District Court
for the District of Oregon

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**United States
Court of Appeals
For the Ninth Circuit**

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of E. J. Welch and Viola Welch, husband and wife, Roland
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Appeal from the United States District Court
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STATEMENT OF THE CASE

This appeal presents purely factual questions. Appellant makes no pretense of bringing before this court any legal ground for reversal. His sole complaint is that the trial court incorrectly decided the facts.

Appellees submit that there was ample evidence to support the trial court's findings. As Judge McColloch said in his Memorandum of Decision (R. 37) "The case has been hard fought", and every argument which appellant now makes was strenuously

urged in the trial court. That court held in favor of the defendants, and we submit that the findings cannot be said to be "clearly erroneous".

PROPOSITIONS OF LAW

1. "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."

Rule 52, F.R.C.P.;

U. S. v. Yellow Cab Co., 338 U.S. 338, 94 L. Ed. 150, 70 Sup. Ct. 177;

Paramount Pest Control Service v. Brewer, 177 F. (2d) 564 (9 Cir.);

Barron & Holtzoff, Federal Practice & Procedure, Vol. 2, § 1133, p. 834:

"Findings of fact are not 'clearly erroneous' unless unsupported by substantial evidence or clearly against the weight of the evidence or induced by an erroneous view of the law. The mere fact that on the same evidence the appellate court might have reached a different result does not justify it in setting the findings aside. The appellate court does not consider and weigh the evidence de novo."

2. Under the test of "good and farmer-like fashion", defendants were not insurers of the success of the crop, but they were only required to exercise reasonable care under the circumstances.

Dellwo v. Edwards, 73 Or. 316, 144 P. 441;

Wells v. B. E. Porter Estate, 205 Cal. 776, 272 Pac. 1039;

Heaton v. Smith, 134 Wash. 450, 235 Pac. 958, affmd. on reh. 240 Pac. 362.

THE FACTUAL BACKGROUND

Appellant's summary of the evidence is argumentative and biased in his own favor. At this stage, the view of the evidence must be taken which is most favorable to the party who prevailed below. *Paramount Pest Control Service v. Brewer, supra*, 37 F. (2d) at 567). Accordingly it is necessary to re-examine the evidence from the standpoint of the defendants. While plaintiff can complain only of matters occurring after the assignment on June 10, 1953, we must review prior events in order that defendants' conduct may be judged in the light of the existing situation.

The Meiss Ranch.

The ranch which is the subject of this controversy is depicted on the map which is Exhibit 2. It comprises approximately 13,000 acres of deeded land, of which about 3,000 acres are reclaimed from the old lake bed (R. 60), west of the dike (R. 77). A large part is still under water east of the dike (R. 77), and the upland around the northeast side of the lake is still in sagebrush (R. 78). The meadow land along the west and south sides is not involved, nor is that part southeast of the lake. Generally speaking, the land involved in the case is in the

reclaimed portion, and on Exhibit 2 it is that marked "grain", on the west side of the dike.

Excess moisture will damage a growing grain crop, and in the old lake bed drainage is quite a problem (R. 80). A system of canals has been constructed which carries the water to a low point about in the center of the ranch, just west of the dike, from which the water is pumped over the dike, into the lake (R. 80). Thus the water level in the lake is 7 or 8 feet higher than the land west of the dike (R. 102). In a wet year there is danger of the dike breaking (R. 98) or overflowing (R. 187, 211) and soaking the grain land. In the late summer the lake may dry up altogether (R. 128).

The lake has no natural outlet, so the water becomes brackish, alkaline and unfit for irrigation after about the first of July (R. 79, 375). Around the edges of the old lake bed there is a lot of alkali in the soil, and there is a strip along the west side of the dike that never has grown anything but salt grass (R. 81-2, 338, 376). On the western side of the ranch there are about 600 acres of adobe ground, which is sticky gumbo when wet and which bakes hard when dry (R. 78, 381). The colored soil map, which is Exhibit 3, shows that according to the U. S. Soil Conservation Service there is no first-class or No. 1 soil on the entire place (R. 207-8, 340). The classifications on the Department of Interior map (Ex. 1) are not based on soil content, but only on slope and terrain (R. 341).

The ranch is situated at the foot of the mountains, at an elevation of 4250 feet (R. 79), and the growing season is uncertain, as frost damage may be experienced at any time of the year (R. 87). There is testimony by disinterested persons who have owned the ranch that portions of the land involved in this case are not suitable for grain-raising in any event (R. 338, 433).

The Defendant, Clay Barr.

Clay Barr has been a farmer all his life (R. 180). He was born and raised on a farm and has done just about everything there was to do around one (R. 180). His experience included stock, grain, and little irrigation (R. 180), on land in Washington, Montana, Oregon and California (R. 181). He had been on the Meiss Ranch in 1948 when it was up for sale, and again in 1951 (R. 181). At the times involved in this case, he was also operating a 2300 acre wheat ranch in Eastern Oregon (R. 249). While he was at the Meiss Ranch, the Oregon ranch was being run with hired help (R. 193).

The Situation at the Time of Barr's Lease.

In August or September, 1952 (R. 101, 365), J. C. Stevenson, Sr., sold the Meiss Ranch to Frank Hofues and A. G. Kirschmer, but Stevenson retained pasture rights on the entire ranch, not only on the meadow land but also on the stubble after the grain was harvested (R. 62, 373). Some 800 acres in the south-east part were also subject to a lease to J. H. Noakes (R. 78, 101, 366, 373); and about 240 or 250 acres

in the south central part—the best part of the ranch—were leased to J. R. Ratliff and a Mr. Scarlett for potatoes (R. 82, 372, 431, 527). Both the pasture lease and the potato lease entailed prior rights to the use of the water on the ranch (R. 84, 374, 431).

Upon purchasing the ranch, Hofues and Kirscher hired J. C. (Bud) Stevenson, Jr. to manage it for them (R. 367). After completing the 1952 harvest, they made a new, written contract with Bud for 1953, whereby Bud was to get a salary of \$500 per month and expenses, plus 5% of the net profit of the crops and pasture, plus an additional sum if the property was sold (Ex. 5, R. 121, 368).

About the first of May, 1953, Hofues and Kirscher visited the ranch and found an unsatisfactory situation (R. 369, 429). Bud Stevenson had planted about 1000 acres up to that time, but he had not done a good job of cultivating ahead of the seeding (R. 369). The seed bed was so poorly prepared that the grain drill didn't penetrate, but left the seed lying on top of the ground (R. 369-70). The planting was so poor that when the owners saw it, a workman was harrowing to try to cover up the seed (R. 369)!

As a result of this visit the owners realized that they were not going to get the ranch planted, the way it was going (R. 368), and they concluded that a change in management was necessary (R. 369). Hofues expressed their thought succinctly, when he testified that the trouble was incompetence on the part of Bud Stevenson (R. 429).

an attempt to salvage something out of the situation, the owners contacted the defendant, Clay Barr, and requested him to take it over (R. 181). Barr visited the ranch about May 5, 1953, and a lease was negotiated to the Barrs for the period to include including the crop season of 1963, for a rental of 50% of the gross proceeds (Ex. 14, R. 192).

Because of the prior commitments on the ranch, Barr's lease was subject to:

- (a) The lease of pasture rights to Stevenson, Sr.;
- (b) The lease of 800 acres to Noakes;
- (c) The lease of 240 acres for potatoes;
- (d) The reservation of prior water rights for the pasture and potatoes; and
- (e) The management contract with Bud Stevenson.

After making the lease on May 7th, Clay Barr returned to his home in Oregon to make preparations to leave the other ranch, and he returned to the Meiss Ranch about May 9th or 10th, taking over under his lease on May 11th.

By that time there had been about 1200 acres added (R. 188), including the tract which later was referred to as the "weed patch" (R. 183, 188). The land was very wet (R. 183). The east side of the tract north of the main cross-ditch had been fallowed, and it was too wet to do anything with (R. 184-5). Between that and the 'dobe ground (westerly) there was a field of uncut oats left over

from the prior year, which had been tramped down by grazing sheep (R. 185). The drain ditches had not been cleaned out the previous fall, so that they were choked with mud and weeds (R. 185, 188). The 'dobe ground had been seeded (all but 60 or 70 acres that was later summer-fallowed), but without any seed-bed preparation (R. 185-6). So little cultivating had been done that last year's stubble was still standing after the seeding, with the seed left lying on top of the ground (R. 186). At that time the lake was so full of water it was splashing over the top of the dike (R. 187).

4. The Period Between the Lease and the Assignment.

When Clay Barr took over, he brought down several of his own men from the Oregon ranch (R. 193), so that he had a farm crew of about ten, besides himself and Bud Stevenson (R. 194). He also brought some of his own machinery (R. 195) although that was not required under his lease (Ex. 14). Because Bud Stevenson refused to give up the ranch house, Barr was unable to bring his family down from Oregon, so Barr lived in the bunkhouse with the men, and his family stayed on the Oregon ranch throughout the 1953 season (R. 191-2, 376-7).

In that area, there was a late, wet spring in 1953 (R. 85), with rain and snow almost continuously until the middle of June (R. 194). The area described as the "weed patch" had water lying on top of the ground (R. 194). The pumps were kept going, but because the drain ditches were choked, drainage

was very poor (R. 197). The cleaning of the ditches, which should have been done the previous fall, could not be done in the spring because the heavy drag-line equipment would have mired down (R. 197). In that weather, planting was impossible, and attempts to work the fields resulted only in miring the tractors (R. 195). When it dried off the least bit, they would work day and night, using lights on the tractors at night (R. 196). By putting paddle boards on the tractors (an arrangement scoffed at by Bud Stevenson, as an old-fogey idea of his father's) they were able to finish the planting by June 8th or 9th (R. 198-9), having lost about half their working time during the planting season (R. 198-9).

After finishing the rest, they went back and reseeded a portion in the southwest corner that Bud had previously sown, and which had been flooded out (R. 199, 203). Because it was apparent that the silted ground was not going to produce much with the inadequate cultivation that had been done, Barr refrained from seeding the last 60 or 70 acres of it, so as to concentrate on finishing the bottom land (R. 202-3). Later he went back and plowed up that 60 or 70 acres for summer-fallow (R. 203).

About the 15th or 20th of May, Barr consulted with a commercial sprayer, Lester Liston, about spraying the weed patch, just west of the dike (R. 199, 203-4). At that time the grain had just begun to come up (R. 170), and there was quite a number

of weeds visible (R. 177). It was too wet and too early to spray at that time, however (R. 204). By the time the rain stopped, about ^{June} July 10th to 15th, the grain in the weed patch was very sick and poor, because of the alkali and flooded soil (R. 204-5). He did not try to re-seed the weed patch because by then it was too late to make a crop (R. 208).

5. The Spokane Settlement.

On June 7, 1953, with the seeding about finished, Clay Barr had to leave the Meiss Ranch to attend a trial in Spokane, Washington (R. 209). Throughout the present trial, and in his brief, plaintiff has reiterated that the Spokane case was a "fraud" action, in a not-too-subtle attempt to prejudice the court against Clay Barr. While the issues in that case have never been adjudicated, and of course are wholly irrelevant here (R. 287), reference to the pleadings (appended to the deposition of Horton Herman) will show that Clay Barr was charged with vicarious responsibility for the acts of a real estate agent. In that action the plaintiff was E. J. Welch, represented by the present plaintiff, J. P. Tonkoff, as his attorney, and defendant Barr's attorney was Horton Herman.

During the course of the trial a settlement was agreed upon whereby Clay Barr and his wife assigned their interest in the 1953 crop from the Meiss ranch, after reserving \$15,000 for harvesting expenses, to Tonkoff and Herman, the two attorneys (Exhibit 5 to Herman deposition). This is the as-

gnment on which plaintiff predicates his case. Konkoff and Herman then made a Declaration of Trust providing for division of the proceeds of the crop (up to the amount of \$72,500) among various persons interested in the litigation, including their own attorneys' fees (Ex. 7).

Barr testified that he never at any time represented the crop as being of any particular value or having any particular yield, but he offered merely his interest in the crop, for whatever it might be worth (R. 141-3). At that time the crop had barely been planted, and much of it was not yet sprouted, so a crop prediction was impossible (R. 242). Plaintiff's evidence shows that he relied upon a phone call which Welch made to Bud Stevenson and his wife, rather than upon anything Barr had said (R. 129, 142). The Barrs of course were not parties to the Declaration of Trust, so Clay had no idea how the various portions of the assignment were determined (R. 243).

Clay Barr did make an estimate of the total amount of grain planted, which was arrived at in this manner: He had been informed that there were approximately 3300 acres of cultivated land, out of which 200 acres were leased for potatoes, leaving 3100 acres. He figured that about 150 acres had been plowed up, so he played safe by calling it 200, which would cut the total down to 2900. Then he allowed an extra 100 acres for good measure and quoted approximately 2800 acres as planted in grain (R. 244). So far as he knows, no one has actually measured the number of planted acres (R. 245).

6. The Period from the Assignment until Harvest.

After the Spokane settlement was concluded on June 10th, Clay Barr returned immediately to the Meiss Ranch (R. 209). The most pressing problem was excessive water in the lake, and in order to protect the levee and avoid flooding, they pumped water out of the lake onto the sagebrush uplands in the northeast part of the ranch (R. 210-11). For 30 days continuously, day and night, they pumped approximately 8000 gallons a minute out of the lake, until the sagebrush land was so saturated that the water was working back into the lake again (R. 212). During that time there was no lack of water on the cultivated ground (R. 212), and the crops perked up and seemed to be coming along pretty fair, with the exception of the 'dobe ground and the weed patch, which never did look good (R. 212). The bottom land had plenty of moisture all summer long (R. 213).

Along towards summer the 'dobe ground began to dry out (R. 213). However, that land had never been levelled or graded for irrigation, and the only way it could be irrigated was to pump water up on to it and just let it run off naturally (R. 200-201, 381-2). As Kirschmer testified: "The best you could do was just haphazard irrigation, hit here and miss there" (R. 382). As an owner, he had never contemplated irrigating there (R. 382), and the necessary preparation for irrigation was "not a tenant's job anyway" (R. 381). Stevenson, Sr. had told Kirschmer that irrigation wasn't necessary (R. 382).

The 'dobe ground of course was higher than the adjacent bottom land, and putting water on the 'dobe ground (where the crop was poor anyway because of inadequate cultivation before seeding) involved the danger that some of it would run down onto the ripening grain on the bottom land (where the best crop was).

It is undisputed that the important thing was to keep water off the grain on the good bottom land. Stevenson, Sr. admitted that if water had been allowed on the bottom land during the summer, it would have started a second-growth, which would have delayed harvest so that the entire crop might have been lost because of frost or fall rains (R. 86-7). When Barr sought Stevenson's advice about irrigating, Stevenson warned Barr against letting any water get on the bottom land (R. 199-200).

About June 20th, Barr returned to Oregon to make preparations for the harvest on the Oregon ranch (R. 210). He left one of his own men, Jeff Williams, on the Meiss Ranch (R. 217), and of course Bud Stevenson was there as manager (R. 106). Before leaving, Barr requested Bud to work on cleaning out the ditches and starting some irrigating, saying that he, Barr, would be back later with another man to help (R. 217).

About July 1st Welch, who had been at the Meiss ranch, reported to Tonkoff that the grain was dry (R. 143-4), so arrangements were made for Tonkoff, Welch and Barr to fly down in Tonkoff's private

plane to inspect it (R. 213-4). Tonkoff and Barr drove out into the fields along the west side, stopped in different places and kicked down into the soil a couple of inches. Although it was dry on top, there was moisture underneath, and Tonkoff remarked that "it didn't look too bad" (R. 215). They went up onto the 'dobe ground and discussed the landlord's restrictions on Barr's use of the water and the problem of trying to irrigate without getting water down on the bottom land (R. 215). When Tonkoff urged Barr to irrigate, Barr agreed to try a little of it, but he wouldn't guarantee to irrigate the 'dobe land (R. 216). Barr's testimony of the following colloquy is undisputed:

"And I says, 'What's more,' I says, 'if you and Mr. Welch and the rest of them are interested in this—or dissatisfied in the way I am operating this place, give me the expenses I am out from June 10th on and you take it over.' He says, 'No, no. You are doing fine. We don't want nothing to do with it.'

"Q. That was Tonkoff that said that?

"A. That is Tonkoff that said that." (R. 216).

While Barr was at the Meiss Ranch about July 1st, he called the commercial sprayer, Liston, to come out again and look at the weed patch (R. 170). Liston came out about July 2nd or 3rd, and at that time the weeds were so bad and the grain was so poor that a heavy enough spray to kill the weeds would also have killed the grain (R. 171, 204). Barr testified that because of the wet start and the alkali soil, the

weeds in that area were always ahead of the grain, and there was no time that season when the grain in the weed patch was strong enough to withstand the dosage of spray that would have been necessary to kill the weeds (R. 205). In passing, it may be noted that Stevenson, Sr. never did any spraying on the ranch (R. 80), although he told Barr that the same patch had gone to weeds the last two years he had the place (R. 201). Barr did have some spraying done (R. 171-2).

Sometime after July 2nd or 3rd, Barr returned to Oregon, and then brought another workman, Perry Morter, back with him to the Meiss Ranch about July 12th to 15th (R. 217). At that time they inspected the irrigating that Bud Stevenson and Jeff Williams had done, and found that the water was running off the 'dobe ground, down into the bottom and (R. 218). They concluded to try moving the water more often, not leaving it so long in one place, and Barr left Morter in charge, with instructions to call him (R. 218-9). Morter called the next day and said they couldn't move the water fast enough to keep it out of the bottom land, so Barr told him to shut it off (R. 219).

During the summer various spots that were not producing good grain crops were plowed up, for summer-fallow and to keep the weeds down. These included about 100 acres in the "weed patch" (R. 220), about 60 to 70 acres of alfalfa in the 'dobe ground (R. 221), and some alkali land on the north

side that had not been seeded (R. 221). Since the crop on those spots was poor anyway, there was no loss of grain production by plowing them up (R. 90-1), and even Stevenson, Sr. did not criticize Barr for the plowing (R. 92).

The relationship between Barr and Bud Stevenson during the summer did not prove satisfactory (R. 219). Bud still regarded himself as the manager (R. 122), but he resented the fact that Barr's lease would deprive him of a job for the following years (R. 219-20). He did not cooperate with Barr except for the single job of cleaning out some ditches and starting the pumps so that Williams could irrigate in the latter part of June (R. 217-20).

7. Harvest Time.

Clay Barr finished the harvest on the Oregon ranch around August 7th, and he went directly to the Meiss ranch (R. 223). He brought three of his own men who were experienced operators (R. 229), and additional harvesting equipment, and he also rented extra equipment (R. 223). All of the harvesters on the place were of the pull-type, which would have wasted grain if operated alone, so he provided two self-propelled combines to open up the fields ahead of the others (R. 223-4).

Barr had given the ten days' notice of the commencement of harvest, as required by the assignment, stating that harvest would begin on or about the first of September (R. 222, Ex. 8), but the grain was not ready to harvest at that time, and it was

September 8th before the grain was ripe enough so they could actually begin (R. 224). Even that proved to be early, and some of the grain had to be "double-handled" and stored for a while to dry out, before it could be loaded into box cars (R. 227).

The harvesting started with the fields which opened first, and it moved steadily along with six combines going (R. 227-9). There is a sharp conflict in the evidence as to whether there was any excessive waste of grain in the fields. Witnesses who testified that there was no undue waste were: Clay Barr (R. 229-230, 248), Leonard Flint (R. 302), Perry Morter (R. 313), Harold Morter (R. 326), Warren Barnam (R. 336-7), A. G. Kirschmer (R. 384).

There is also a conflict as to the amount of grain spilled along the road while hauling into town. One of the trucks "had his endgate jiggle loose" on the rough road, and he lost a quarter or a third of one load (R. 236-7). Other than that, there is substantial testimony that there was no abnormal or undue pillage of grain along the road, e.g.: Clay Barr (R. 229-230, 248), Ralph Smith (R. 293-4), Perry Morter (R. 313), Harold Morter (R. 326), A. G. Kirschmer (R. 384-5).

There were no public grain elevators within a long distance, so it was necessary to sell the grain promptly and load directly into box cars (R. 239). The Barrs had nothing to do with the sale of the crop, as Bud Stevenson contracted for the sale of the owner's half interest, and Welch contracted for the half interest assigned by Barr to Tonkoff and

Herman (Ex. 4, R. 119-20, 240, 388). Barr was not consulted about the sale, and never saw an accounting for it until the time of trial (R. 159, 240).

Before the harvest started, the Barrs sold their interest under the lease to the Farnam brothers to take effect October 1st, or as soon as the 1953 crop was completed (R. 225-6). To get the owner's consent, Clay Barr had to make a trip to Denver on the 5th of September, and he was back on September 9th, at the beginning of harvest (R. 226). Around October 5th, when the bulk of the harvest was completed, Barr returned to Oregon, and he moved out completely from the Meiss Ranch on October 19th (R. 239).

Between September 9th and October 5th, Clay Barr was on the Meiss Ranch continuously, personally supervising the harvesting every day (R. 229-31). When he left on October 5th all the harvesting was done except the weed patch, which was left to the last because there was the least grain there (R. 231). Because the crop was so poor on that patch, the expense of harvesting was greater than any possible return, and if it had been his own crop, he would not have attempted to harvest the weed patch at all (R. 231). But because it wasn't his crop he made "an extreme effort to get everything that was humanly possible" by harvesting all that there was (R. 231). The Barrs' expenses of harvesting exceeded \$16,000.00, when the assignment had reserved them only \$15,000.00 for that purpose (R. 234-5).

ANSWERS TO SPECIFICATIONS OF ERROR

I.

The Bud Stevenson Management Contract

Appellant challenges the finding that the management contract remained in effect throughout the 1953 harvest season. His objection is not to the truth of the finding, which cannot be disputed, but because he doesn't like the "implications and inferences that might be drawn therefrom" (Appellant's Brief, p. 29). This is hardly a basis for attack upon a finding, the purpose of which is merely to state the fact, and let the inferences fall where they will.

That the finding is true, and the management contract did remain in effect, is attested by Bud Stevenson (R. 105-6, 121-2), by Kirschmer (R. 377), by Clay Barr (R. 189-192, 265-6), and by the written agreement itself (Ex. 5). If that were not true, why was Bud staying on the place? And by what authority did Bud dispose of the owner's half-interest in the crop?

The fact is material, in that it helps to refute plaintiff's allegation that defendants Barr "sold all of the crops" (Complaint, Par. 9, R. 7), when the crops were in fact sold by Stevenson and Welch. It also helps to explain the difficulties under which Clay Barr was working that summer, in the face of personal animosity, divided responsibility, conflicting advice, and without even housing for his family!

II.

The Warranty of Acreage
(Specifications II and III).

The warranty in question says only that *approximately* 2800 acres are planted to crop. Clay Barr's method of computing the acreage was detailed above (R. 244), and it is just as good an estimate as that of anyone else. The exact number of acres has not been measured by anyone, and in view of the varying estimates the trial court was entitled to accept Barr's as correct. Even if the actual number of acres was 2500, 2600 or 2668, the variation would be within the latitude allowed by the word "approximately".

III.

Farming in a Good and Farmer-Like Fashion
(Specifications IV through IX).

We deem it unnecessary to comment in detail upon all of plaintiff's reckless and scurrilous charges, as the only question here is whether there is evidence to support the trial court's findings that defendants Barr "did not fail, refuse or neglect to farm the Meiss ranch in a good and farmer-like manner" and "did not breach or fail to perform any covenant, provision or condition of the assignment dated the 10th day of June, 1953, or any subsequent promise or agreement". We will limit our discussion to the allegations of negligence in the complaint, and in that order (R. 5-6).

(a) *Spraying for Weeds.*

Despite the attempt of plaintiff to make it appear that the weeds "simply took over" (Appellant's Br., p. 38), there is substantial evidence that the only place on the ranch where weeds were any problem was the area referred to as the "weed patch" (R. 246). This was in the southeast part, west of the dike, where the early flooding and the high alkaline content of the soil combined to give the weeds a head start over the grain. No one denies that the weeds there were bad and the grain was poor, but it was not through any fault of Clay Barr. It was one of those circumstances inherent in farming. There is evidence that because of the relative strength of the weeds and grain, there was no time during the growing season that the weeds could have been sprayed effectively without also killing the grain (R. 246-7). It is significant that Stevenson, Sr. told Barr that the same piece had gone to weeds the last two years he had it (R. 201), and the Farnams were unable to raise a crop on it in the next two years after Barr left (R. 338).

(b) *Irrigation.*

With customary exaggeration plaintiff tries to make it appear that the entire crop was burning up (Appellant's Br., p. 43). In fact, there was ample moisture all during the summer in the bottom land (R. 213), and the only area that showed any lack of water was the 'dobe ground and a strip west of the potato field (R. 247). The area west of the potato

field was in fact irrigated by Barr's man (R. 218). The 'dobe ground could not be effectively irrigated because it had never been prepared by grading and levelling (R. 200-1, 381-2), and the danger of having water run off onto the bottom land outweighed any chance of improving the crop on the 'dobe ground. It is apparent that the actual reason for the poor crop on the 'dobe ground was the failure of Bud Stevenson to cultivate it properly before seeding. If he had prepared a good seed bed, with a mulch on top, it wouldn't have cracked and it would have conserved the natural moisture (R. 271-8), so as to make a crop without irrigation, as the owners intended (R. 382).

(c) *Plowing Under 120 Acres of Oats.*

The area involved in this charge was in the weed patch, which Barr plowed up because the grain was thin and the weeds were bad (R. 247-8). Plaintiff concedes that "it undoubtedly would be good practice to plow up a patch of weeds" (Appellant's Br., p. 45), and his argument that the weeds were bad because of failure to spray has already been refuted. His argument that the oats were thin because of failure to irrigate blithely ignores the evidence that the oats in the weed patch were suffering not from too little water, but from too much! There was no lack of water in the bottom land, near the dike, where the weed patch was located (R. 213). The trial court could well have agreed with Barr that the only mistake was in not plowing more of

the weed patch under (R. 248).

(d) *Wasting of Grain in the Fields*
and

(e) *Spillage of Grain on the Road.*

On both these points we have previously referred to the conflict in testimony (*Supra*, p. 17), and the conflict has been resolved in favor of the defendants. The accident which caused a portion of one load to be spilled on the road is certainly not sufficient to support a charge of negligent husbandry. The trial court was entitled to believe the many witnesses who testified that there was no undue waste, even if, as plaintiff argues (*Br.* p. 49), some of them were relatives of Barr.

IV.

Plaintiff's Prayer for Judgment (Specification X).

Plaintiff presents nothing new under this point and merely reiterates that the crop should have produced more. In fact, there is ample evidence that the crop was good except in two areas: the weed patch and the 'dobe ground (R. 378-381). The reasons for the poor crop in those areas have been discussed above, and there is certainly sufficient evidence to support a finding that the fault was not in Clay Barr's management. The testimony of Kirschmer, one of the owners and himself an experienced farmer, should carry great weight:

"A. The primary difficulty was—as I see it, the primary difficulty started with the poor job

of seeding the first one thousand acres, and secondly, three weeks of cold wet weather. After that sprouted it just laid there and the weeds grew and the grain didn't grow. That is as I see it. And the wheat and the barley and the rye and the oats seemingly got in a weakened condition, and too there was some alkali in that grain; after the ground stood cold so long and wet so long the alkali came out, and I believe that was the primary reason why that seven hundred acre field didn't do no good, because the grain had come up pretty good at one time, but not too good, but it come up to a fair stand; and then when fall come there wasn't no grain there; it just dried out, that is what I am going by.

"Q. You feel that it was the excessive dampness and alkali?

"A. A cold, damp spring let the alkali do too much work before the grain got to going."
(R. 385-6).

With respect to irrigation, Kirschmer testified:

"A. This land that they talked of irrigating isn't land that you can—it wasn't prepared for irrigation. Stevenson never irrigated it and it never was prepared for proper irrigation. You could irrigate it, but you know water, how water is, it runs around here and there and everywhere; you could have probably helped it some by irrigating, but you wouldn't have ever got a job. In order to get a job irrigating, you have got to put a float on that land and float it and prepare it so that when you put water on it it will spread, and that wasn't done; there was no time for it." (R. 410-11).

nd again:

“A. It wasn’t prepared sufficiently to do a volume job of irrigating, or a good job of irrigating; it would just be kind of a half irrigating job. It was somewhat on the discouraging order to try to do it. You could go at it and get some water on it, but it wouldn’t make any money. It would just be kinda of a half way irrigating job, something on a discouraging order to try to do it. You could go at it and get some water on it, but it just wouldn’t make, it wouldn’t make any money. I tell you, it just wasn’t set to irrigate that kind of a acreage, wasn’t prepared.

“Q. Suppose they had wanted to irrigate it, was there water available with which to irrigate it?

“A. All they could have done was with lake water, and, of course, at that time, it was of questionable merit.

“Q. In other words, the only water available was the lake water, and the lake water was so full of alkali that it couldn’t be used, and there wasn’t anything to irrigate it with?

“A. Well, of course, I wasn’t there to check the water, but that is the report we get on the water. By mid-season it gets so heavily alkaliied that it isn’t good practice to use it. The Soil Conservation and even the AAA Office have recommended not to use it.

“That wasn’t the big objection; the big objection is the lack of preparation for irrigation, lack of arrangement. Nobody had ever irrigated

and nobody had ever prepared it to irrigate, and it was just a haphazard operation, the best you could have made of it. There was no pump there to pump any quantity of water. They could have pumped some water, sure.

“Q. Has that been irrigated since then?

“A. No, the boys didn’t irrigate it.

“Q. And during the eight years that Jim Stevenson had operated it, he hadn’t irrigated it either?

“A. There was no preparation made for irrigating. You could have irrigated a few acres, of course.

“I am giving you my opinion, my exact opinion of the thing. I feel just like I am talking. I irrigate enough here to know what it takes to irrigate. You have got to be prepared to irrigate.” (R. 419-20).

Kirschmer’s overall-conclusion is significant:

“Q. From your standpoint as an owner of the ranch and having an interest in the crop, is there anything wrong with the operation of Mr. Barr in managing the ranch for that year?

“A. Yes, it wasn’t his fault; he got there too late. If he would have started March 1st, I would have been critical on the operation, but being as he started as late as he did, I am not critical.

“Q. Did you feel that he did the best that he could under the circumstances?

“A. Under the circumstances, getting started late and wet weather hitting him, there was just nothing anybody could do.” (R. 391-2).

CONCLUSION

Implicit in appellant's brief is the contention that farming is an exact science. With naive simplicity he argues that because a piece of ground produced a record crop in 1947 (when much of the land was still virgin), therefore it should have produced a similar crop in 1953, and its failure to do so must have been the result of negligent management.

Anyone who has had anything to do with it knows that farming is one of the biggest gambles there is (R. 277). The most serious factors—the weather and the market—are ones over which the farmer has no control. And others—e.g. weeds, insects, soil and water conditions, etc.—are subject to only limited control. In attempting to cope with the forces of nature, the farmer is faced with innumerable questions requiring the exercise of judgment in the light of particular circumstances.

With the benefit of hindsight, when all uncertainties have been resolved, it is easy to say that some other course of conduct might have produced a better crop. But it is quite a different thing to have the responsibility of making a vital decision on the ground. Recall, for instance, that plaintiff Tonkoff, who is now so eager to criticize, refused to accept any responsibility when Barr offered to step out and let Tonkoff and the others take it over. "No, no," said Tonkoff, "You are doing fine, we don't want nothing to do with it." (R. 216).

Appellant asked the trial court to “second-guess” the defendants’ farming practices; and failing in that, he now asks this court to “second-guess” the trial court, without the benefit of seeing and hearing the witnesses. Experienced farmers expressed sharply differing views as to what was good or bad farming under the peculiar situation in which Barr found himself. Surely this is not the kind of a case for an appellate court to try *de novo* on the cold record.

Clay Barr stepped into a bad situation in an attempt to help the owners salvage something out of what was otherwise a lost season. When he took over, nearly half the crop had been sown by an incompetent manager, without adequate cultivation. The drain ditches, which are vital to that kind of operation, were clogged, and it was impossible to clean them in time to carry off the spring rains. His late start, combined with a cold, wet spring, set the whole season back, so that at harvest time they were fighting against the chance of fall rains that would destroy the entire crop. The two areas which did not produce—the alkali weed patch and the gumbo ’dobe ground—did not have good soil conditions for grain anyway. He was faced with prior leases on some of the land, prior commitments on the water, a contract with an unfriendly manager, and didn’t even have housing for his family. Under the circumstances we submit that Clay Barr did well to salvage as much as he did.

Far from being indifferent to the operation, Barr went beyond the call of duty. He brought in his own equipment, when that was not required under his lease. He expended his own money in the harvest, above the amount reserved to him for that purpose. He harvested what grain was in the weed patch, when if it had been his own he would have let it go. He even brought his own mother down to cook for the harvest crew.

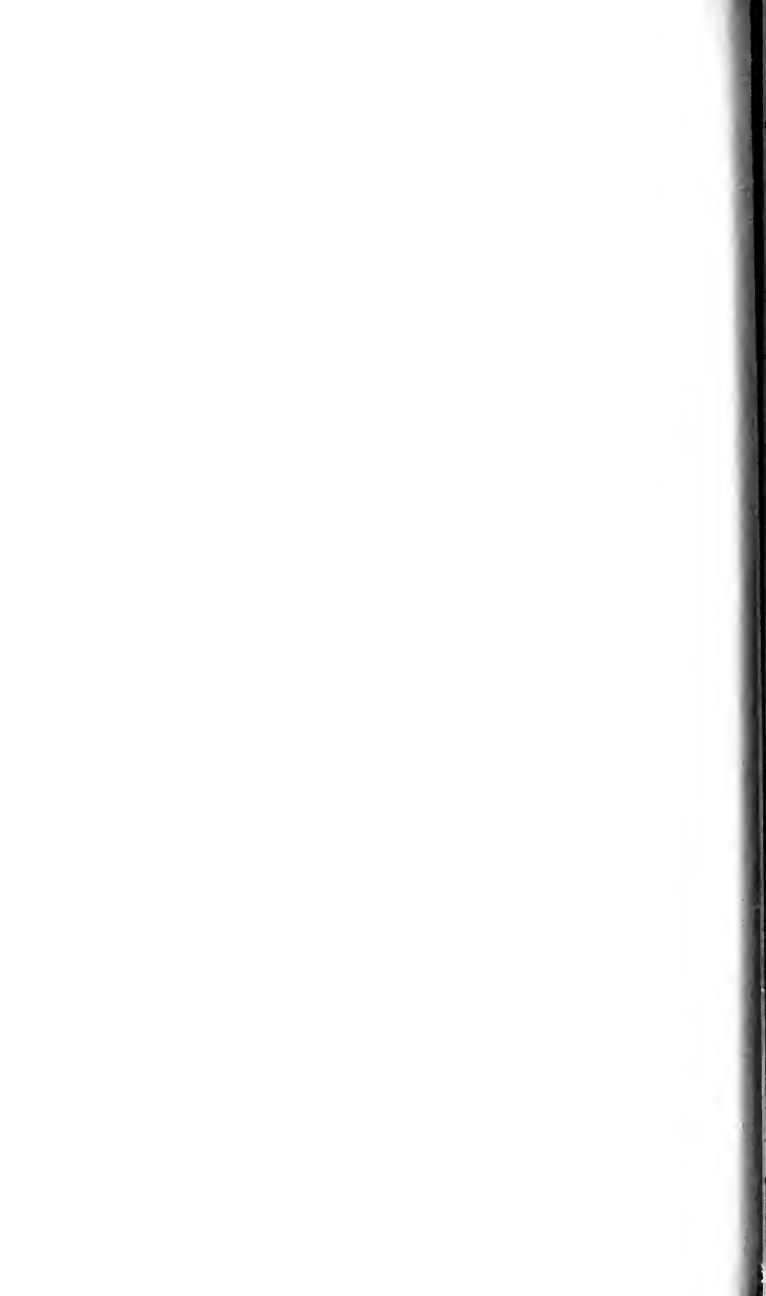
As Judge McColloch said in his memorandum decision: "Land-owner Kirschmer exonerates defendant and I do the same."

Respectfully submitted,

RANDALL B. KESTER,

MAGUIRE, SHIELDS, MORRISON & BAILEY,

Attorneys for Appellees.



No. 15023

United States
Court of Appeals
for the Ninth Circuit

AMEROCEAN STEAMSHIP COMPANY, INC.,
a corporation, and BLACKCHESTER LINES,
INC., a corporation, Appellants,

vs.

ALBERT W. COPP, Jr., as Executor under the
Last Will and Testament of Albert W. Copp,
deceased, Appellee.

Transcript of Record

Appeal from the United States District Court for the Western
District of Washington, Northern Division

FILED

MAR 21 1956

PAUL P. O'BRIEN, CLERK

No. 15023

United States
Court of Appeals
for the Ninth Circuit

PACIFIC OCEAN STEAMSHIP COMPANY, INC.,
a corporation, and BLACKCHESTER LINES,
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vs.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF PROCTORS

SUMMERS, BUCEY & HOWARD,

Central Building,
Seattle 4, Washington,

Proctors for Appellants.

BOGLE, BOGLE & GATES,

Central Building,
Seattle 4, Washington,

Proctors for Appellee.

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In the United States District Court for the Western
District of Washington, Northern Division

No. 16054—In Admiralty

AVON SMITH,

Libelant,

vs.

THE STEAMSHIP AMEROCEAN and All Per-
sons Claiming Any Interest Therein, and
BLACKCHESTER STEAMSHIP CO., its
masters, charters, agents or representatives,
Respondents.

LIBEL

To the Honorable Judges of the District Court of
the United States for the Western District of
Washington, Northern Division:

The libel of Avon Smith against The Steamship
Amerocean, its engines, etc., and against All persons
claiming any interest therein, and Blackchester
Steamship Company, its masters, charters, agents,
or representatives, in a cause of action in tort for
damages for personal injuries, civil and maritime,
alleges as follows:

I.

That at all times hereinafter mentioned the Black-
chester Steamship Company, was and still is a for-
eign corporation.

II.

That at all times and dates hereinafter mentioned
the Blackchester Steamship Company owned, oper-
ated, and controlled the steamship Amerocean.

III.

That at the time hereinafter mentioned, the libelant was in the employ of the Northwest Ship Repair Company.

IV.

That at the time hereinafter mentioned, the Blackchester Steamship Company and the steamship Amerocean, its masters, charterers, agents or representatives contracted with the Northwest Ship Repair Company for the purpose of making certain repairs to and doing certain rigging and removing of dunnage on the steamship Amerocean.

V.

That at the time hereinafter mentioned, libelant was lawfully upon the steamship Amerocean and was lawfully engaged in the course of his employment thereon.

VI.

That at the time hereinafter mentioned, the said steamship Amerocean was lying in the navigable waters of the United States, at Northwest Ship Repair Company's dock, in Seattle, Washington.

VII.

That on or about the 16th day of August, 1954, while libelant was lawfully engaged in the course of his employment upon the said steamship Amerocean, libelant without any fault on his own part, and wholly and solely through the carelessness, recklessness and negligence of the Blackchester Steamship Company and the steamship Amerocean, its officers, agents, servants, employees, and the

crew thereof, was caused to fall upon a portion of the deck of said vessel which was slippery with oil, as result of which he sustained severe and painful injuries, in that, among other things, he suffered a fractured left hip. That the respondents were negligent in oiling one half of said ship's deck and leaving it in a slippery and hazardous condition and leaving the other half of the deck in an ordinary unoiled condition. That the respondents were negligent in permitting said condition to remain and the deck to be a source of menace and danger and in failing to give any warning of this oiled and slippery condition or to guard or rope off this area to prevent anyone from coming upon it unaware, as a result of all of which libelant was caused to and did fall on the slippery oil deck when he stepped from the hatch upon which he had been standing while working on the rigging of the booms and upon said oiled surface of the deck, thereby sustaining severe and painful injuries. That libelant had been upon the other side of the deck, which was unoiled, before going onto the hatch.

VIII.

Upon information and belief that said injuries were directly caused by reason of the negligence of the defendants, their agents, servants and employees in that they failed and neglected to supply the plaintiff with a safe place in which to work; failed to supply the plaintiff with a sufficient number of competent co-employees and superior officers; failed to properly instruct the libelant in the course

of his duties; failed to properly superintend and supervise the work going on at the time libelant was injured; failed to promulgate and enforce proper and safe rules for the safe conduct of said work and to warn libelant of the impending danger due to the presence of oil on one side of the deck and the absence of oil from the other side of the deck upon which libelant had stood prior to going up upon the hatch.

IX.

That by reason of said injury libelant sustained a fractured left hip, has suffered and will continue to suffer great pain and suffering, has been hospitalized, has lost large sums of money which he would have otherwise earned, has been forced to provide for his own maintenance and hospitalization, and has suffered a permanent disability which will prevent him from carrying out his duties and occupation as he did prior to said action, all to his damage in the sum of \$40,000.00.

X.

That the said steamship Amerocean is now within this district and within the jurisdiction of this Court.

XI.

That all and singular the premises are true and within the admiralty and maritime jurisdiction of this Honorable Court.

For a second, separate and independent cause of action.

I.

Libelant repeats and realleges each and every allegation contained in paragraphs I, II, III, IV, V and VI, with equal force and vigor as if the same were herein set forth in full.

II.

That on or about the 16th day of August, 1954, while libelant was lawfully engaged in the course of his employment upon the said steamship Amerocean, libelant without any fault on his own part, and wholly and solely as a direct and proximate result of the unseaworthiness of said steamship Amerocean, was caused to slip and fall on an oily and slippery portion of the deck of said vessel, thereby sustaining severe and painful injuries in that, among other things, he suffered a fractured left hip. That said vessel was unseaworthy in that one half of the deck was oiled and slippery and in a hazardous condition while the other half was in an unoiled condition and that no guards or ropes or warnings were present to prevent one from coming upon the oiled surface without knowledge thereof.

III.

That libelant stepped down upon said oiled and slippery surface of the deck without knowledge or warning of its hazardous and slippery condition, since he had previously gone up upon the hatch from the unoiled side of the deck.

IV.

That as a direct and proximate result of the unseaworthiness of the steamship Amerocean libellant sustained a fractured left hip, has suffered and will continue to suffer great pain and suffering, has been hospitalized, has lost large sums of money which he would have otherwise earned, has been forced to provide for his own maintenance and hospitalization, and has suffered a permanent disability which will prevent him from carrying out his duties and occupation as he did prior to said action, all to his damage in the sum of \$40,000.00.

V.

That the said steamship Amerocean is now within this district and within the jurisdiction of this Court.

VI.

That all and singular the premises are true and within the admiralty and maritime jurisdiction of this Honorable Court.

Wherefore, the libellant prays:

1. That process in due form of law and according to the course and practice of this Court in case of admiralty and maritime jurisdiction, may issue against the said steamship Amerocean, its engines, etc., and that all persons claiming any interest therein may be cited to appear and answer the matters aforesaid, and that said steamship Amerocean, its engines, etc., may be condemned and sold

to satisfy the claim of the libelant aforesaid, for \$40,000.00 on each count with costs.

2. A monition issue to the respondent, Black-chester Steamship Company, which is and may be served within the jurisdiction of this Court, and that it may be required to answer on oath all and singular the matters aforesaid, and

3. That this Honorable Court may be pleased to decree the payment of the amount due as aforesaid, \$40,000.00, on each account against the said respondent as its liability may appear, together with the costs of this action, and

4. That the libelant herein may have such other and further relief in the premises as in law and justice he may be entitled to receive.

/s/ KANE & SPELLMAN,
Proctors for Libelant

Duly Verified.

[Endorsed]: Filed Sept. 10, 1954.

[Title of District Court and Cause.]

CLAIM OF OWNERSHIP

The Amerocean Steamship Company, Inc., a corporation, and Blackchester Lines, Inc., a corporation, as owners of the respondent steamship "Amerocean", her engines, etc., intervening for their interest as such owners, appear before the above entitled court and claim said respondent steamship, pray that they will be permitted to defend accordingly, and that said court will order restitution thereof and otherwise administer right and justice in the premises.

The Amerocean Steamship Company,
Inc. and Blackchester Lines, Inc.

By SUMMERS, BUCEY & HOWARD
/s/ THEODORE A. LEGROS,
Proctors for Claimants

United States of America,
State of Washington, County of King—ss.

Theodore A. LeGros, being first duly sworn, on oath states that he is a member of the firm of Summers, Bucey & Howard, and as such is one of the proctors of record for the claimants herein, that he is authorized to make the foregoing claim of ownership on behalf of The Amerocean Steamship Company, Inc. and Blackchester Lines, Inc., owners of the S.S. "Amerocean"; that said claimants now are the sole true and bona fide owners of said

respondent steamship "Amerocean", her engines, etc., and that as such owners they are entitled to the sole and complete possession thereof.

/s/ THEODORE A. LEGROS

Subscribed and sworn to before me this 10th day of September, 1954.

[Seal] /s/ G. H. BUCEY,
Notary Public in and for the State of Washington,
residing at Seattle.

Acknowledgment of Service attached.

[Endorsed]: Filed Sept. 10, 1954.

[Title of District Court and Cause.]

OBLIGATION IN LIEU OF BOND

Know all men by these presents:

That in consideration of the respondent Steamship "Amerocean", her engines, etc. being forthwith released from the official custody of the United States Marshal without delay and without bond, the undersigned, Amerocean Steamship Company, Inc., a corporation, and Blackchester Lines, Inc., a corporation, as owners, and The Steamship Mutual Underwriting Association, Limited, as protection and indemnity underwriters thereon, do hereby obligate themselves irrevocably (upon written demand by or for libelant served upon Summers, Bucey & Howard of Seattle, Washington, as proc-

tors of record for the respondent steamship "Amer-ocean" and claimants thereof), either to pay in full judgment not exceeding \$40,000.00 plus interest and costs, if any, in the above entitled cause in favor of libelant as may be provided by final decree of the above entitled court or any appellate court; or to furnish and file herein stipulation for value and costs in the sum of \$40,000.00 in the usual form duly executed in behalf of the claimants as principals and in behalf of an approved corporate surety as surety.

Dated this 10th day of September, 1954 at Seattle.

The Amerocean Steamship Company,
Inc., a corporation, and
Blackchester Lines, Inc., a corpora-
tion, owners and claimants of the
S.S. "Amerocean"

By SUMMERS, BUCEY & HOWARD
/s/ THEODORE A. LEGROS,
(Specially authorized)

The Steamship Mutual Underwriting
Association, Limited

By SUMMERS, BUCEY & HOWARD
/s/ THEODORE A. LEGROS,
(Specially authorized by John C. Monroe, its United
States representative at New York)

To the United States Marshal:

The foregoing obligation in lieu of bond having
been approved by us, you are hereby authorized

and directed to release the respondent steamship from your official custody without further security.

Dated this 10th day of September, 1954, at Seattle, Washington.

KANE & SPELLMAN

/s/ KANE & SPELLMAN,

/s/ By JOHN D. SPELLMAN,

Proctors for Libelant

To the clerk of the above entitled court:

Upon the filing of the foregoing obligation in lieu of bond, libelant consents that claimants may appear in the above entitled cause without filing the usual stipulation for costs.

Dated this 10th day of September, 1954, at Seattle, Washington.

KANE & SPELLMAN,

/s/ KANE & SPELLMAN,

/s/ By JOHN D. SPELLMAN,

Proctors for Libelant

Seattle, Washington, September 10, 1954

I hereby certify and return that in accordance with the Obligation in Lieu of Bond, I did release the Steamship Amerocean, its engines, etc., at Se-

attle, Washington, on the 10th day of September, 1954.

W. B. PARSONS,
United States Marshal

/s/ By JOHN E. O'CONNOR,
Deputy

[Endorsed]: Filed Sept. 10, 1954.

[Title of District Court and Cause.]

CLAIMANTS' EXCEPTIONS TO LIBEL

The above named claimants except to the alleged First Cause of Action of the libel herein on the ground that it is incompetent and improper and fails to state a cause of action in rem against the respondent vessel; since the only jurisdiction obtained in this action is in rem against said vessel, and said alleged cause of action purports to be based only upon the alleged negligence of said vessel, her owner and operator, and its officers, agents and servants, and the crew of said vessel, which is not a proper basis for such a cause of action in rem; hence said alleged cause of action should be dismissed or stricken.

Without waiving the foregoing exceptions, said claimants further except to said libel on the ground that it purports to allege two "separate and independent" causes of action seeking the same alleged damages for the same alleged injuries.

SUMMERS, BUCEY & HOWARD

/s/ G. H. BUCEY,

/s/ THEODORE A. LEGROS,

Proctors for Claimants

Acknowledgment of Service attached.

[Endorsed]: Filed Sept. 29, 1954.

[Title of District Court and Cause.]

ORDER SUSTAINING EXCEPTIONS
TO LIBEL

Upon due hearing on this day on claimants' exceptions to the libel herein, directed to the alleged first cause of action therein, claimants appearing by G. H. Bucey of Summers, Bucey & Howard, their proctors, and libelant appearing by John D. Spellman of Kane and Spellman, his proctors;

Libelant's proctors having conceded that said alleged first cause of action should be dismissed or stricken, but without prejudice to said alleged second cause of action; and it appearing to the court proper;

It is now ordered that said exceptions with respect to said alleged first cause of action are sustained and said alleged cause of action is dismissed, but without prejudice to said alleged second cause of action;

It is further ordered that claimants may have

ten days from this date within which to answer said libel.

Done in open court this 22nd day of November, 1954.

/s/ JOHN C. BOWEN,
U.S. District Judge

Approved and presented by:

/s/ RICHARD W. BUCHANAN,
of Proctors for Claimants

Approved by:

/s/ KANE & SPELLMAN,
/s/ By JOHN D. SPELLMAN,
of Proctors for Libelant

[Endorsed]: Filed Nov. 22, 1954.

[Title of District Court and Cause.]

ORDER

There having been duly and regularly presented to this court on this day the petition of Amerocean Steamship Company, Inc., and Blackchester Lines, Inc., claimants herein, duly verified by oath and duly filed herein, seeking to have process issued in the above entitled cause against Albert W. Copp, doing business under the assumed name of "North-west Ship Repair Co.", and to bring him into said

cause as an additional party respondent under the provisions of Rule 56 of the Admiralty Rules promulgated by the Supreme Court of the United States; and it appearing to the court proper that process be so issued herein against him, and that he be brought into said cause as an additional party respondent herein, and cited to appear and answer said petition, as well as the libel herein, and that libellant also be required to answer said petition;

Now, therefore, it is ordered that, upon said petitioners Amerocean Steamship Company, Inc. and Blackchester Lines, Inc. filing herein a stipulation in the sum of \$250.00, conditioned as required by the above mentioned Admiralty Rule 56, with sureties required by said rule, process be issued herein forthwith in accordance with the practice of this court, in causes of admiralty and maritime jurisdiction, against said Albert W. Copp, doing business under the assumed name of "Northwest Ship Repair Co.", citing him to appear herein and answer said petition, as well as said libel, not later than December 21st, 1954, and also that a copy of said petition be served upon the proctors for the libellant herein, together with a copy of this order, and that libellant make due answer to said petition not later than 10:00 a.m. on said last mentioned date.

Done in open court this 1st day of December, 1954.

/s/ JOHN C. BOWEN,

United States District Judge

Approved and presented by:

/s/ G. H. BUCEY,
Of Proctors for Petitioners

[Endorsed]: Filed Dec. 1, 1954.

[Title of District Court and Cause.]

PETITION

(Under Admiralty Rule 56)

To the Honorable Judge of the above entitled court:

Your petitioners, Amerocean Steamship Company, Inc., a corporation, and Blackchester Lines, Inc., a corporation, the claimants in the above entitled action, for their petition herein under Admiralty Rule 56 against Albert W. Copp, doing business under the assumed name of "Northwest Ship Repair Co.", the third party respondent above named, allege and petition as follows:

I.

Said Amerocean Steamship Company, Inc., and said Blackchester Lines, Inc., are corporations organized and existing under and by virtue of the laws of the State of New York, and the owners and operators of the above named respondent steamship Amerocean, and are the claimants herein of said vessel.

II.

Said Albert W. Copp, hereinabove designated as third party respondent, is and at all times herein-

after mentioned has been a resident of the city of Seattle, Washington, doing business therein under the assumed name of "Northwest Ship Repair Co."

III.

On September 10, 1954, there was filed in the above entitled court by the above named libelant, Avon Smith, a libel in rem against the above named respondent steamship Amerocean, her engines, etc., in admiralty cause therein No. 16054, a copy of which libel, marked Exhibit A, is hereto attached and by this reference made part hereof; but by order of the above entitled court entered herein on November 22, 1954, the first alleged cause of action herein was dismissed, without prejudice, however, to the alleged Second Cause of Action therein. In said alleged Second Cause of Action of said libel, said libelant seeks to recover damages from said respondent vessel in the sum of \$40,000.00 for personal injuries alleged to have been sustained by him on board said vessel on August 16, 1954, while said vessel was lying afloat alongside a dock in the navigable waters of the port of Seattle, Washington, and while he was engaged thereon in the course of his employment by "Northwest Ship Repair Co.", being the third party respondent above referred to; it being alleged therein that said injuries were caused by his slipping and falling on a portion of the deck of said vessel which it is alleged was oily and slippery, and that said vessel was unseaworthy in that respect.

IV.

The time within which to answer said libel has not expired and will not expire until after December 2, 1954; and your petitioners, as claimants of said vessel, are about to file herein their answer thereto, denying that said vessel was unseaworthy in the respects alleged, or at all, and denying that libelant's alleged injuries were caused in whole or in part by any unseaworthiness of said vessel, and denying any liability whatever to said libelant for his alleged injuries.

V.

At and prior to the time when libelant alleges he was injured on board said respondent vessel, he was engaged thereon as a rigger assisting in the work of removing certain dunnage and other material from the cargo compartments of said vessel, which work involved, among other things, the rigging of certain cargo booms of said vessel; libelant being then employed by, and under the exclusive control and supervision of, said third party respondent, who during all said period was engaged, as an independent contractor, in sole and complete charge, control and supervision of such work, having sole and complete charge, control and supervision of all portions of said vessel, and of her winches, booms and other equipment used or involved in the doing of such work, and of all persons engaged therein.

VI.

Prior to the commencement of said work by said third party respondent, your petitioners turned over

to him, and he thereupon assumed, as an independent contractor, the exclusive charge, control and supervision of all portions of said vessel, and of all her winches, booms and other equipment required or involved in the doing of such work; all of which portions of said vessel and her said equipment, including particularly all places where libelant was required to work, then were seaworthy and reasonably safe, proper and adequate for the doing of said work, if they were used, and said work done, in a reasonable and proper manner, and with the exercise of all reasonable, customary and proper precautions to avoid injury; and the nature and condition of all said portions of said vessel and her equipment, and the proper and safe manner of use thereof, and the reasonable, customary and proper precautions to be taken to avoid injury, were open and obvious to said third party respondent, and his agents and employees, and were fully known and appreciated by them, then and at all times prior to the time when libelant alleges he was injured, which precautions, if taken, would have avoided said alleged injuries.

VII.

If, after trial, it be found and determined by the court, notwithstanding the facts hereinabove alleged by your petitioners, that your petitioners, as owners and/or operators of said respondent vessel, are legally liable in damages to libelant, by reason of any failure to discharge their non-delegable duty to provide a seaworthy vessel and equipment, and

a safe place for libelant to work on said vessel; then said third party respondent is liable to petitioners for full indemnity with respect to such liability to libelant, for one or more of the following reasons, to wit:

(1) That all portions of said vessel and of her winches, booms and other equipment required or involved in the doing of the work aforesaid, were in a seaworthy and reasonably safe condition for use in such work if done in a reasonable and proper manner with the exercise of all reasonable, customary and proper precautions to avoid injury, at the time they were turned over to said third party respondent, and he then assumed exclusive charge, control and supervision thereof; and if any of said portions of said vessel, or any of her equipment thereafter became unseaworthy or unsafe, resulting in a breach of your petitioners' non-delegable duty to provide a seaworthy vessel and equipment and a safe place for libelant to work, such unseaworthiness or lack of safety was caused solely by negligence of said third party respondent, his agents and servants, in failing to properly use said portions of said vessel and her equipment, and/or in causing them to become unseaworthy or unsafe, and/or in using them and conducting said work without the exercise of reasonable customary and proper precautions to avoid injury, which precautions, if taken, would have avoided libelant's alleged injuries.

(2) That when said third party respondent un-

dertook, as an independent contractor, to perform the aforesaid work on board said vessel, and assumed control and supervision of all portions of said vessel and of her equipment required or involved in the doing of said work, and of all persons assisting in such work, he became obligated to your petitioners as owners and/or operators of said vessel to do said work in a safe and proper manner, and to refrain from doing said work, or using any part of said vessel or any of said equipment, negligently in any manner which foreseeably would render any portions of said vessel or her equipment unsafe or unseaworthy, and impose liability upon said vessel or your petitioners as owners and/or operators thereof, either because of their warranty of seaworthiness of said vessel and her equipment and of a safe place thereon for libellant to work, or otherwise.

(3) That if there was any unseaworthiness or lack of safety of said vessel or of any of her equipment, or of libellant's place of work thereon, which caused or contributed to libellant's alleged injuries (which your petitioners deny), it was due to negligence on the part of said third party respondent, his agents and servants, which was the active and primary cause of any injuries sustained by libellant; and, if there was any such unseaworthiness or lack of safety with respect to said vessel or any of her equipment, (which your petitioners deny), it was merely passive or secondary to said active negligence of said third party respondent.

VIII.

All and singular the foregoing premises are true and within the admiralty and maritime jurisdiction of the above entitled court.

Wherefore, your petitioners pray that in accordance with the provisions of Rule 56 of the Admiralty Rules, promulgated by the Supreme Court of the United States, process in due form of law, according to the course of this Honorable Court in causes of admiralty and maritime jurisdiction, may issue against said third party respondent, and that he may be cited to appear and answer, on oath, this petition, and the libel herein; that libelant also may be required to answer this petition; and that this Honorable Court may dismiss the libel of the libelant herein as against said vessel; but if any recovery herein be awarded to libelant against your petitioners, as claimants of said vessel, or otherwise, and/or against the obligors upon the obligation in lieu of bond and stipulation for costs, filed herein by your petitioners, that your petitioners be awarded recovery over by way of full indemnity against said third party respondent; and that such other or further proceedings shall be had and decree rendered herein by this court, as to law and justice shall appertain.

AMEROCEAN STEAMSHIP
COMPANY, INC.

BLACKCHESTER LINES, INC.

/s/ By G. H. BUCEY,

As One of Their Proctors
(Petitioners)

SUMMERS, BUCEY & HOWARD
/s/ G. H. BUCEY,
/s/ THEODORE A. LEGROS,
Proctors for Said Petitioners

[Exhibit attached hereto is a duplicate of Libel set out in full at pages 3-9 of this printed record.]

Duly Verified.

[Endorsed]: Filed Dec. 1, 1954.

[Title of District Court and Cause.]

PETITIONERS' STIPULATION TO PAY COSTS, DAMAGES AND EXPENSES

Know All Men By These Presents: That we, Amerocean Steamship Company, Inc., a corporation, and Blackhester Lines, Inc., a corporation, as principals, and National Surety Corporation, a corporation organized and existing under and by virtue of the laws of the state of New York, and duly authorized to transact the business of surety in the state of Washington, as surety, are held and firmly bound unto Whom It May Concern in the sum of Two Hundred Fifty Dollars (\$250.00) for the payment of which sum, well and truly to be made, we do hereby bind ourselves, and our respective successors and assigns, jointly and severally firmly by these presents.

The Condition of this obligation is such that,
Whereas, a libel was filed in the above entitled

District Court of the United States for the Western District of Washington, Northern Division, by the above named libelant, Avon Smith, against the above named steamship Amerocean, her engines, etc., for the reasons and causes in said libel mentioned; and

Whereas, the above named principals have appeared in said cause and claimed the said vessel; and are about to file herein a petition seeking to bring into said cause as a third party respondent therein, Albert W. Copp, doing business under the assumed name of "Northwest Ship Repair Co.", under the provisions of Rule 56 of the Admiralty Rules promulgated by the Supreme Court of the United States;

Now, Therefore, if the above bounden principals shall pay to the libelant and/or to said Albert W. Copp, all such costs, damages and expenses as shall be awarded against them by the court, on the final decree, whether it be rendered in this or in the appellate court, then this obligation shall be void; otherwise, it shall be and remain in full force and virtue.

In Witness Whereof, we have hereunto subscribed our names and affixed our seals this 30th day of November, 1954.

AMEROCEAN STEAMSHIP COM-
PANY, INC.,
BLACKCHESTER LINES, INC.,

/s/ By G. H. BUCEY,

As One of Their Proctors
(Principal)

[Seal] NATIONAL SURETY CORPORATION,

/s/ By MARCELLA SEARS,
As Its Attorney-in-Fact
(Surety)

[Endorsed]: Filed December 1, 1954.

[Title of District Court and Cause.]

ANSWER OF CLAIMANTS TO LIBEL

To the Honorable Judge of the Above Entitled Court:

Amerocean Steamship Company, Inc., a corporation, and Blackchester Lines, Inc., a corporation, the claimants in the above entitled action, for answer to the libel herein, admit, deny, and allege, respectively, as follows:

I.

With respect to Article I of libelant's first alleged cause of action, which is adopted by Article I of his alleged Second Cause of Action: claimants admit that at all times therein referred to Blackchester Lines, Inc. (erroneously referred to in said article as "Blackchester Steamship Company") was and still is a corporation foreign to the State of Washington.

II.

With respect to Article II of libelant's first alleged cause of action, which is adopted by Article I of his alleged Second Cause of Action: claimants

admit that during the times therein referred to said Blackchester Lines, Inc., a corporation, together with Amerocean Steamship Company, Inc., a corporation, owned said steamship Amerocean; but otherwise claimants deny each and every allegation of said article.

III.

With respect to Article III of libelant's first alleged cause of action, which is adopted by Article I of his alleged Second Cause of Action: claimants admit that at the time therein referred to libelant was in the employ of one Albert W. Copp, doing business under the assumed name of "Northwest Ship Repair Co."; but otherwise they deny each and every allegation of said article.

IV.

With respect to Article IV of libelant's first alleged cause of action, which is adopted by Article I of his alleged Second Cause of Action: claimants admit that at the time therein referred to, a charterer of said vessel had contracted with said Albert W. Copp, doing business under the assumed name of "Northwest Ship Repair Co.", as an independent contractor, to remove certain dunnage and other material from the cargo compartments of said vessel, which work involved, among other things, the rigging of certain cargo booms of said vessel by said contractor through his agents and employees; but said claimants deny each and every other allegation contained in said article.

V.

With respect to Article V of libelant's first alleged cause of action, which is adopted by Article I of his alleged Second Cause of Action: claimants admit the allegations therein contained.

VI.

With respect to Article VI of libelant's first alleged cause of action, which is adopted by Article I of his alleged Second Cause of Action: claimants admit the allegations therein contained.

VII.

With respect to Article II of said alleged Second Cause of Action: claimants admit that on August 16, 1954, while libelant was lawfully engaged on said steamship Amerocean, in the course of his employment by said Albert W. Copp, he fell on the deck of said vessel and sustained some injury thereby, as to the exact nature of which claimants deny knowledge or information sufficient to form a belief. Claimants admit that a portion of the deck on one side of said vessel previously had been oiled with a fish oil preparation, commonly used on such vessels to prevent rust of the deck plates, and that there were no guards or ropes to prevent one from going onto that portion of said deck; but claimants deny each and every other allegation contained in said article; and particularly deny that libelant was without warning or knowledge of the condition of said portion of said deck at and prior to the time

that he fell thereon, and deny that his falling was without fault on his part.

VIII.

With respect to Article III of said alleged Second Cause of Action: claimants deny each and every allegation therein contained.

IX.

With respect to Article IV of said alleged Second Cause of Action: claimants deny knowledge or information sufficient to form a belief as to the nature or extent of libelant's alleged injuries, his alleged pain and suffering, his alleged hospitalization, his alleged loss of earnings, or expenses of maintenance or hospitalization; or as to his alleged disability, but they deny that he has been damaged in the respects or in the amount alleged, or at all, by reason of any unseaworthiness of said vessel; and otherwise deny each and every allegation in said article.

X.

With respect to Article V of said alleged Second Cause of Action: claimants admit that at the time said libel was filed said vessel was within this district and within the admiralty and maritime jurisdiction of the above entitled court.

XI.

With respect to Article VI of said alleged Second Cause of Action: claimants admit the admiralty and maritime jurisdiction of the above entitled court,

but deny that the premises alleged in said libel are true, except as hereinabove admitted or stated.

First Affirmative Defense

For a First Affirmative Defense to the alleged cause of action set forth in said alleged Second Cause of Action of said libel, said claimants allege as follows:

I.

At and prior to the time when libelant alleges he was injured on board said respondent vessel, he was engaged thereon as a rigger assisting in the work of removing certain dunnage and other material from the cargo compartments of said vessel, which work involved, among other things, the rigging of certain cargo booms of said vessel; libelant being then employed by and under the exclusive control and supervision of, one Albert W. Copp, who during all said period was engaged, as an independent contractor, in sole and complete charge, control and supervision of such work, having sole and complete charge, control and supervision of all portions of said vessel, and of her winches, booms and other equipment used or involved in the doing of such work, and of all persons engaged therein.

II.

Prior to the commencement of said work by said Albert W. Copp claimants turned over to him, and he thereupon assumed, as an independent contractor, the exclusive charge, control and supervision of all portions of said vessel, and of all her winches,

booms and other equipment required or involved in the doing of such work; all of which portions of said vessel and her said equipment, including particularly all places where libelant was required to work, then were seaworthy and reasonably safe, proper and adequate for the doing of said work, if they were used, and said work done, in a reasonable and proper manner, and with the exercise of all reasonable, customary and proper precautions to avoid injury; and the nature and condition of all said portions of said vessel and her equipment, and the proper and safe manner of use thereof, and the reasonable, customary and proper precautions to be taken, to avoid injury, were open and obvious to said Albert W. Copp, and his agents and employees, including libelant, and were fully known and appreciated by them, then and at all times prior to the time when libelant alleges he was injured, which precautions, if taken, would have avoided said alleged injuries.

III.

At and prior to the time when it is alleged that libelant fell on the deck of said vessel, he was experienced in the doing of such work upon such a vessel, and was advised and knew the condition of the portion of the deck where it is alleged he fell, and understood and appreciated the necessity of exercising all reasonable care and caution to avoid falling when going upon said portion of said deck, which care and caution, if exercised by him, would have avoided his falling and sustaining injury; but he failed to exercise such care and caution, and any

and all injuries which he then sustained were due solely to his own carelessness and negligence in that regard, and/or to negligence of said Albert W. Copp, his agents and servants, in failing to exercise reasonable, customary and proper precautions in the conduct of said work to avoid such injury. Hence, libelant is not entitled to recover herein from claimants; but, if any unseaworthiness of said vessel or her equipment was a proximate cause of libelant's alleged injuries (which claimants deny), then said negligence of libelant contributed as a proximate cause of said injuries, and any recovery herein from claimants must be reduced in the proportion that libelant's negligence contributed as a proximate cause of said injuries.

Wherefore, said claimants pray that said libel may be dismissed, or that such other order or decree be entered herein as law and justice may require, and that claimants may have and recover their costs and disbursements herein from libelant.

SUMMERS, BUCEY & HOWARD,
/s/ G. H. BUCEY,
/s/ THEODORE A. LE GROS,
Proctors for said Claimants

Duly Verified.

[Endorsed]: Filed December 1, 1954.

[Title of District Court and Cause.]

CITATION

The President of the United States of America:

To the Marshal of the United States for the Western District of Washington,

Greeting:

Whereas, a libel has been filed in the United States District Court for the Western District of Washington, Northern Division, on or about the 10th day of September, 1954, by the libelant named in the above entitled action against the respondent vessel therein named, said action being an action civil and maritime, in which said libelant seeks to recover from said respondent vessel damages in the sum of \$40,000.00 for personal injuries alleged to have been sustained by him on board said vessel on August 16, 1954, while he was engaged thereon in the course of his employment by "Northwest Ship Repair Company", that being the assumed name under which the third party respondent above named, Albert W. Copp, was and is doing business, it being alleged in said libel that said alleged injuries were due to unseaworthiness of said vessel; upon which libel a monition and attachment was issued out of said court, and said respondent vessel was arrested and attached thereunder; and

Whereas, Amerocean Steamship Company, Inc., a corporation, and Blackechester Lines, Inc., a corporation, have appeared in said action and claimed the

said vessel as owners thereof, and have, on December 1st, 1954, filed in said court and cause a petition under the provisions of Rule 56 of the Admiralty Rules promulgated by the Supreme Court of the United States, seeking to bring into said action as a third party respondent therein Albert W. Copp, doing business under the assumed name of "Northwest Ship Repair Co.", and praying that a citation may issue against him to appear and answer on oath said petition and said libel, in accordance with the rules and practice of this court;

Now, Therefore, we do hereby empower and strictly charge and command you, the said Marshal, that you cite and admonish the said third party respondent, Albert W. Copp, doing business under the assumed name of "Northwest Ship Repair Co.", if he shall be found in your district, that he be and appear before the above entitled court, on the 21st day of December, 1954, at 10:00 o'clock in the forenoon of said day, at the court room thereof, in Seattle, Washington, then and there to answer said petition, and also said libel, and to make his allegations in that behalf; and have you then and there this writ, with your return endorsed thereon, or attached thereto.

Witness, the Honorable John C. Bowen, Judge of said court, at the city of Seattle, in said Western District of Washington this 1st day of December, 1954.

[Seal]

MILLARD P. THOMAS,
Clerk

SUMMERS, BUCEY & HOWARD,

G. H. BUCEY,

Proctors for Petitioner

Marshal's Return attached.

[Endorsed]: Filed December 13, 1954.

[Title of District Court and Cause.]

ANSWER TO CLAIMANTS' PETITION

Comes now the Libelant and through his attorneys, Kane & Spellman, answers the claimants' petition, as follows:

I.

Answering paragraph I, libelant admits same.

II.

Answering paragraph II, libelant admits same.

III.

Answering paragraph III, libelant admits same.

IV.

Answering paragraph IV, libelant admits said paragraph sets forth claimants' intentions of that date.

V.

Answering paragraph V, libelant admits that he was engaged on respondent vessel as a rigger and was then employed by third party respondent; but regarding each and every allegation, matter and

thing otherwise contained therein, libelant alleges that he is without knowledge or information sufficient to form a belief as to the truth thereof and therefore denies same.

VI.

Answering paragraph VI, libelant alleges that he is without knowledge or information sufficient to form a belief as to the truth thereof and therefore denies same.

VII.

Answering paragraph VII, libelant alleges that he is without knowledge or information sufficient to form a belief as to the truth thereof and therefore denies same.

VIII.

Answering paragraph VIII, libelant denies that all and singular the premises in the petition are true, alleging that he is without knowledge or information sufficient to form a belief as to the truth thereof.

/s/ KANE & SPELLMAN,
Proctors for Libelant

Duly Verified.

Acknowledgment of Service attached.

[Endorsed]: Filed December 21, 1954.

[Title of District Court and Cause.]

ANSWER OF THIRD PARTY RESPONDENT

Comes Now Albert W. Copp, doing business under the assumed name of Northwest Ship Repair Company, third party respondent herein, and for answer to the petition to bring in third party respondent under Rule 56, admits, denies and alleges as follows:

I.

Answering Article I of said petition, third party respondent admits the same.

II.

Answering Article II of said petition, third party respondent admits the same.

III.

Answering Article III, of said petition, third party respondent admits the same.

IV.

Answering Article IV of said petition, said third party respondent admits the same.

V.

Answering Article V of said petition third party respondent admits that libelant was injured on board respondent's vessel while working as a rigger, while removing dunnage, and while being employed by third party respondent; third party respondent

denies each and every other allegation contained in Article V.

VI.

Answering Article VI of said petition third party respondent denies the same.

VII.

Answering Article VII, of said petition, third party respondent denies the same.

VIII.

Answering Article VIII of said petition, third party respondent denies the same.

Wherefore, having fully answered petition to bring in third party under Rule 56, third party respondent prays that it be dismissed herein, and that it recover its costs and disbursements herein to be taxed.

/s/ BOGLE, BOGLE & GATES,
Proctors for Third Party
Respondent

Duly Verified.

Acknowledgment of Service attached.

[Endorsed]: Filed December 21, 1954.

[Title of District Court and Cause.]

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled cause having duly come on for trial before the undersigned judge of the above entitled court, libelant appearing in person and claimants being represented by their proctors, Summers, Bucey & Howard (Theodore A. LeGros of counsel) and third party respondent by their proctors, Bogle, Bogle & Gates (Edward S. Franklin of counsel), and the court, having heard evidence from the respective parties and their witnesses and having heard argument of counsel, and being otherwise fully advised in the premises, does now make and enter the following:

Findings of Fact

I.

That the Amerocean Steamship Company, Inc., and Blackchester Lines, Inc., are corporations organized and existing under and by virtue of the Laws of the State of New York, and were the owners and operators of the respondent S. S. Amerocean during all times material herein, and are the claimants of said vessel.

II.

That third party respondent, Albert W. Copp, was doing business in Seattle, King County, Washington, under the assumed name and style of

Northwest Ship Repair Co.” That prior to the trial of this action said Albert W. Copp died and pursuant to stipulation in open court between proctors for claimants and third party respondent, Albert W. Copp, Jr., Executor of the Estate of Albert W. Copp, deceased, was substituted as third party respondent.

III.

That on or about the 16th day of August, 1954, pursuant to contract, said third party respondent, and his agents and servants, boarded the S. S. *Amerocean* for the purpose of cleaning the holds of said vessel which had just returned to Seattle, and, said third party respondent was engaged in such work as an independent contractor having sole and complete charge, control and supervision of such work, and having sole and complete charge, control and supervision of all portions of said vessel and all her winches, booms and other equipment used and involved in doing of such work, and of all persons engaged therein, including the libellant.

IV.

That libellant Avon Smith while employed by said third party respondent was injured on the S. S. *Amerocean* on August 16, 1954, while said vessel was lying at Van Vettters dock, Seattle, Washington, and upon the navigable waters of the United States, when he slipped on the port side of the main deck of the S. S. *Amerocean* abreast of No. 1 hatch. That the port side of the deck of the S. S. *Amer-*

ocean had been fish-oiled at sea about August 2, 1954.

V.

That libelant Avon Smith brought suit against the S. S. Amerocean alleging that said steamship was unseaworthy in that the deck of said vessel was oily and slippery and that said steamship failed to provide him with a safe place to work.

VI.

That claimants, prior to trial, settled libelant's claim against said vessel for injuries by paying the sum of Twelve Thousand Five Hundred Dollars (\$12,500.) which sum was orally stipulated in open court by proctors for third party respondent to be a reasonable settlement of libelant's claim, leaving only claimants' third party claim for full indemnity against third party respondent to be tried by the court.

VII.

That proctors for claimants admitted in open court that the main deck port side of the S. S. Amerocean was in an unseaworthy condition at time of libelant's accident because of its slippery condition, by reason of which ship owner had breached its non-delegable duty to provide libelant with a safe place to work.

VIII.

That said S. S. Amerocean was negligent in failing to provide a seaworthy vessel and to provide a safe place to work, which negligence was passive.

IX.

That third party respondent, through its agents and employees, namely foremen Walter W. Houlton and Claude W. Romo, had knowledge of the condition of the main deck port side of the S.S. Amerocean sometime prior to the injury to libelant, and with such knowledge had ordered libelant to work on that portion of the main deck of said vessel without warning him of the known condition of said deck or exercising due care to remedy said known condition of said deck all of which negligence was active negligence and the sole proximate cause of libelant's injury.

X.

That neither third party respondent nor its agents or employees obtained any assurance prior to libelant's injury from any of the officers of the S.S. Amerocean that sawdust or other substance would be sprinkled on the port side of said deck to correct its slippery condition.

XI.

That the intervenors lien for compensation and medical expense paid libelant by intervenors has been satisfied.

Done in open court this day of October, 1955.

-----,
U.S. District Judge

From the foregoing findings of fact, the court does now make and enter its

Conclusions of Law

I.

That all of the above are within the Admiralty and Maritime jurisdiction of this court.

II.

That the negligence of claimants was passive and the negligence of third party respondent was the active proximate cause of libelant's injury, and claimants are entitled to full indemnity against the third party respondent in the sum of Twelve Thousand Five Hundred Dollars (\$12,500.) together with costs.

III.

That the libel herein is dismissed with prejudice and without costs to any party.

IV.

That intervenor's petition be dismissed without costs.

Done in open court this day of October, 1955.

-----,
U.S. District Judge

Acknowledgment of Service attached.

[Endorsed]: Filed October 6, 1955.

[Title of District Court and Cause.]

PROPOSED DECREE

The above entitled case having duly come on for trial before the undersigned judge of the above entitled court on Sept. 28, 1955, libelant appearing in person and claimants being represented by their proctors, Summers, Bucey & Howard (Theodore A. LeGros of counsel) and third party respondent by their proctors, Bogle, Bogle & Gates (Edward S. Franklin of counsel), and the court, having heard evidence from the respective parties and their witnesses and having heard argument of counsel, and being otherwise fully advised in the premises, and having heretofore made and entered its Findings of Fact and Conclusions of Law.

Now Therefore, in accordance therewith

It is herewith Ordered, Adjudged and Decreed that the libel be dismissed with prejudice and without costs to any party, and

It is further Ordered, Adjudged and Decreed that claimants be and they are hereby awarded full indemnity against substituted third party respondent in the sum of Twelve Thousand Five Hundred Dollars (\$12,500.) together with their costs, and

It is further Ordered, Adjudged and Decreed that intervenor's petition be dismissed without costs.

Done in open court this day of October, 1955.

-----,
U.S. District Judge

Presented and Approved by:

/s/ SUMMERS, BUCEY & HOWARD,

/s/ THEODORE A. LeGROS,

Proctors for Claimants

Acknowledgment of Service attached.

[Endorsed]: Filed October 6, 1955.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter having come on for trial before the above entitled court, on September 28, 1955; and the libelant being represented by his proctors, Messrs. Kane and Spellman, and claimants being represented by their proctors, Messrs. Summers, Bucey & Howard and Theodore A. LeGros, Esquire; and Third Party Respondent and Substituted Third Party Respondent, and Intervenor being represented by their proctors, Messrs. Bogle, Bogle & Gates, and Edward S. Franklin, Esquire, and the court having listened to the statements and stipulation of counsel, and to all the evidence in the cause, offered by any of the parties herein, and being fully

advised in the premises, now enters herein the following:

Findings of Fact

I.

That claimants, Amerocean Steamship Company, Inc., and Blackchester Lines, Inc., a corporation, were the owners and operators of the Liberty vessel "Amerocean" at all times material to the libel.

II.

That on or about August 16, 1954, claimants entered into a contract with Albert W. Copp, doing business under the assumed name of "Northwest Ship Repair Company," Third Party Respondent, to clean the holds of the steamship "Amerocean" which had just returned to Seattle from a voyage to Japan.

III.

That libelant, Avon Smith, while employed by Third Party Respondent, was injured on the steamship "Amerocean" on Aug. 16, 1954, while said vessel was lying at Van Vetter's Dock, Seattle, Washington, and upon the navigable waters of the United States when he slipped on the port side of the deck of the steamship "Amerocean" abreast of No. 1 hatch because of the slippery condition of the deck. That the port side of the deck of the steamship "Amerocean" had been fish oiled at sea about August 2, 1954, but had failed to dry at the time of libelant's injury and was very slippery, of which fact libelant was unaware.

IV.

That claimants, prior to the trial of this case, settled libelant's claim against them for injuries in the amount of \$12,500. which sum was orally stipulated in open court by proctors for Third Party Respondent to be a reasonable settlement of libelant's claim for damages, leaving only claimant's Third Party claim for indemnity to be tried by the court.

V.

That prior to the trial of the action, Third Party Respondent, Albert W. Copp died and by stipulation in open court between proctors for the claimants and Third Party Respondent it was agreed that Albert W. Copp, Jr., Executor of the Estate of Albert W. Copp, should be substituted as Third Party Respondent in lieu of Albert W. Copp, deceased.

VI.

That proctors for claimants admitted in open court that the deck of the port side of the steamship "Amerocean" was in an unseaworthy condition at the time of libelant's accident because of its slippery condition and that as shipowner it had breached the vessel's non-delegable duty to provide libelant with a safe place to work and the court finds by reason of said breach the libelant was injured.

VII.

That Third Party Respondent was also actively negligent in permitting libelant to proceed to the

port side of the deck of the steamship "Amerocean" without warning him of its slippery condition of which it had knowledge; that its foreman, Walter Holthan, did not obtain any assurances prior to libelant's injury from any of the officers of the "Amerocean" that sawdust or other substance would be sprinkled on the port side of the deck to correct its slippery condition.

VIII.

That the Intervenor's lien for compensation has been satisfied herein by libelant refunding to Intervenor the payment of compensation and medical expenses paid libelant by Intervenor under the Longshoremen and Harbor Worker's Compensation Act.

Done in Open Court this 6th day of October, 1955.

/s/ JOHN C. BOWEN,

Judge

From the foregoing Findings of Fact the court now enters its:

Conclusions of Law

I.

That the joint acts of negligence on the part of both claimants and Third Party Respondent were active, continuous and concurrent to the time of the libelant's injury and proximately caused libelant's injury and claimants and Third Party Respondent were and are joint tort feasons under the doctrine of *Haleyon Lines vs. Haaen Corporation*, 342 U.S. 282, and the Ninth Circuit case of *Union*

Sulphur & Oil Co. vs. Jones, 195 F.(2d), 93 and no right of contribution exists in favor of claimants and Third Party Respondent.

II.

That the libel herein is dismissed with prejudice and without costs to either party.

III.

That claimants' petition impleading Third Party Respondent under Admiralty Rule 56 be dismissed with prejudice and with costs in favor of Third Party Respondent.

IV.

That Intervenor's petition be dismissed without costs.

Done in Open Court this 6th day of October, 1955.

/s/ JOHN C. BOWEN,
Judge

Approved and Notice of
Presentation Waived:

/s/ KANE & SPELLMAN,
/s/ By JOHN D. SPELLMAN,
Proctors for Libelant

Presented by:

/s/ EDW. S. FRANKLIN,
Proctors for Third Party Respondent, Substituted
Third Party Respondent and Intervenor.

Acknowledgment of Service attached.

[Endorsed]: Filed October 6, 1955.

In the United States District Court for the Western
District of Washington, Northern Division

In Admiralty—No. 16054

AVON SMITH,

Libelant,

vs.

THE STEAMSHIP AMEROCEAN, her engines,
etc., Respondent,

AMEROCEAN STEAMSHIP COMPANY, INC.,
a corporation, and BLACKCHESTER LINES,
INC., a corporation, Claimants,

ALBERT W. COPP, doing business under the as-
sumed name of "Northwest Ship Repair Co.",
Third Party Respondent.

ALBERT W. COPP, JR., as Executor under the
Last Will and Testament of Albert W. Copp,
deceased, Substituted Third Party Respondent,

FIREMAN'S FUND INSURANCE COMPANY,
a corporation, Intervenor.

DECREE

This matter coming on for trial before the above
entitled court, on September 28, 1955; and the libel-
ant being represented by his proctors, Messrs. Kane
and Spellman, and claimants being represented by
their proctors, Messrs. Summers, Bucey & Howard
and Theodore A. Le Gros, Esquire; and Third
Party Respondent and Substituted Third Party
Respondent, and Intervenor being represented by
their proctors, Messrs. Bogle, Bogle & Gates and
Edward S. Franklin, Esquire, and the court herein
having entered its Findings of Fact and Conclu-
sions of Law, now, therefore,

It is hereby Ordered, Adjudged and Decreed that the libel herein be dismissed with prejudice and without cost to either party.

It is further Ordered, Adjudged and Decreed that claimants petition to implead Third Party Respondent under Admiralty Rule 56 be dismissed with prejudice and with costs in favor of Third Party Respondent, to which claimants except, and its exception is hereby allowed.

It is further Ordered, Adjudged and Decreed that Intervenor's petition be dismissed without costs.

It is further Ordered, Adjudged and Decreed that the cost bond heretofore filed herein by libelant and the written undertaking in lieu of bond filed by the claimants herein be exonerated from further liability.

Done in Open Court this 6th day of October, 1955.

/s/ JOHN C. BOWEN,
Judge

Approved and Notice of Presentation Waived:

/s/ KANE & SPELLMAN,
/s/ JOHN D. SPELLMAN,
Proctors for Libelant.

Acknowledgment of Service attached.

[Endorsed]: Filed October 6, 1955.

[Title of District Court and Cause.]

EXCEPTIONS TO FINDINGS OF FACT AND
CONCLUSIONS OF LAW AS PROPOSED
BY SUBSTITUTED THIRD PARTY RE-
SPONDENT AND AS SIGNED BY THE
COURT

Claimants herein except to the following Findings of Fact and Conclusions of Law as proposed by substituted third party respondent and as signed by the court, as follows:

Exceptions to Findings of Fact

1. Claimants except to finding number VI, and particularly that portion thereof following the phrase "place to work" in line 16 on page 3, upon the ground that such finding is not supported by, and is contrary to, the greater weight and preponderance of the credible evidence in said cause, in that it finds, in effect, that the alleged breach by claimants of their duty was an active, proximate cause of libelant's injury, instead of finding that it was merely passive and was not an active, proximate cause of such injury.

2. Claimants except to finding number VII upon the grounds that such finding is not supported by, and is contrary to, the greater weight and preponderance of the credible evidence in said cause, and particularly the use of the word "also" before the phrase "actively negligent" in the first line thereof, in that it implies active negligence also on the part

of claimants; and the failure to add after the word "knowledge" in line 22 thereof on page 3 a finding that said third party respondent negligently failed to use reasonable, customary and proper precautions, including the use of sawdust or other substance on said deck to remedy its slippery condition to avoid injury to libelant in using said deck.

Exceptions to Conclusions of Law

3. Claimants except to conclusion of law number I as proposed by substituted third party respondent and as signed by the court, upon the grounds that it is not supported by, and is contrary to, the greater weight and preponderance of the credible evidence in said cause, and that it is not warranted in law; particularly in that it concludes that claimants were guilty of active, continuous and concurrent acts of negligence, which were a proximate cause of libelant's injuries, and that claimants were joint tort feasors with said third party respondent.

4. Claimants except to conclusion of law number III as proposed by substituted third party respondent and as signed by the court, upon the grounds that it is not supported by, and is contrary to, the greater weight and preponderance of credible evidence in said cause, and that it is not warranted in law, in that it concludes that the impleading petition of claimants should be dismissed with prejudice and with costs in favor of third party respondent, instead of concluding that said petition should be sustained and claimants awarded recovery

over against substituted third party respondent as prayed for in said petition.

SUMMERS, BUCEY & HOWARD,
/s/ THEODORE A. LE GROS,
Proctors for Claimants

The foregoing exceptions have been called to the attention of the court and are noted and allowed this 6th day of October, 1955.

/s/ JOHN C. BOWEN,
United States District Judge

Acknowledgment of Service attached.

[Endorsed]: Filed October 6, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Clerk of the above entitled court:

To Albert W. Copp, Jr., as Executor under the Last Will and Testament of Albert W. Copp, deceased, Substituted Third Party Respondent and to Bogle, Bogle & Gates, Proctors for Substituted Third Party Respondent.

Notice is hereby given that Amerocean Steamship Company, Inc., a corporation, and Blackchester Lines, Inc., a corporation, claimants above named do hereby appeal to the United States Court of Appeals for the 9th Circuit from that certain final decree in the above entitled action entered upon the

6th day of October, 1955, by the United States District Court for the Western District of Washington, Northern Division, wherein claimants' petition to implead substituted third party respondent under Admiralty Rule 56 was dismissed with prejudice and with costs in favor of substituted third party respondent.

Dated this 28th day of December, 1955.

AMEROCEAN STEAMSHIP COMPANY, INC., a corporation, and
BLACKCHESTER LINES, INC.,
a corporation,

/s/ SUMMERS, BUCEY & HOWARD,
/s/ By THEODORE A. LE GROS,
Proctors for Claimants

[Endorsed]: Filed December 28, 1955.

[Title of District Court and Cause.]

STIPULATION RE BOND ON APPEAL

Claimants and substituted third party respondent by their undersigned proctors do stipulate that claimants as petitioners have filed herein an undertaking entitled "Petitioners' Stipulation to pay Costs, Damages and Expenses" by the terms of which claimants and/or National Surety Corporation are bound to pay to substituted third party respondent all costs awarded against them on the final decree whether rendered in this or in the ap-

pellate court. That said undertaking remains in full force and effect, and it is stipulated that said undertaking may be considered to be a bond on appeal for the purpose of satisfying the requirement for such bond upon the filing of notice of appeal in this cause.

/s/ BOGLE, BOGLE & GATES,
Proctors for Substituted Third
Party Respondent

SUMMERS, BUCEY & HOWARD,
/s/ THEODORE A. LE GROS,
Proctors for Claimants

ORDER

Upon the foregoing stipulation it is hereby ordered that "Petitioners' Stipulation to pay Costs, Damages and Expenses" be continued in full force and effect as a bond on appeal in satisfaction of the requirement for filing said bond with the filing of notice of appeal in the above entitled cause.

Done in open court this 28th day of December, 1955.

/s/ JOHN C. BOWEN,
United States District Judge

Prepared, Presented and Approved by:

/s/ SUMMERS, BUCEY & HOWARD,
/s/ THEODORE A. LE GROS,
Of Proctors for Claimants

Approved by:

/s/ BOGLE, BOGLE & GATES,

Of Proctors for Substituted Third Party
Respondent

[Endorsed]: Filed December 28, 1955.

[Title of District Court and Cause.]

DESIGNATION OF RECORD

To the Clerk of the Above Entitled Court:

You are hereby requested to include the following listed documents in the record on appeal of the above entitled cause:

1. Libel.
2. Claim of Ownership.
3. Obligation in Lieu of Bond.
4. Claimants' Exceptions to Libel.
5. Order Sustaining Exceptions to Libel.
6. Answer of Claimants to Libel.
7. Petition Under Admiralty Rule 56.
8. Order Allowing Petition.
9. Petitioners' Stipulation to pay Costs, Damages and Expenses.
10. Citation.
11. Answer by Libelant to Claimants' Petition.
12. Answer of Third Party Respondent.
13. Claimants' Proposed Findings of Fact and Conclusions of Law.
14. Claimants' Proposed Decree.

15. Exceptions to Findings and Conclusions as signed by the Court.
16. Findings of Fact and Conclusions of Law.
17. Decree.
18. Notice of Appeal.
19. Stipulation re Bond on Appeal.
20. Reporter's Transcript of the Evidence.

Dated this 12th day of January, 1956.

SUMMERS, BUCEY & HOWARD,
/s/ By THEODORE A. LE GROS,
Of Proctors for Claimants

Acknowledgment of Service attached.

[Endorsed]: Filed January 13, 1956.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Rule 75(o) of the Federal Rules of Civil Procedure, and Subdivision 1 of Rule 10 of the United States Court of Appeals for the Ninth Circuit, and designation of counsel, I am transmitting herewith as the Apostles on Appeal in said cause, the following original documents in the file dealing with the action, to-wit:

1. Libel, filed Sept. 10, 1954.
4. Claim of Ownership, filed Sept. 10, 1954.
5. Obligation in Lieu of Bond, filed Sept. 10, 1954.
7. Claimants' Exceptions to Libel, filed Sept. 29, 1954.
10. Order Sustaining Exceptions to Libel, filed Nov. 22, 1954.
13. Petition under Admiralty Rule 56, filed Dec. 1, 1954.
11. Order Allowing Petition under Adm. Rule 56, filed 12-1-54.
15. Answer of Claimants to Libel, filed Dec. 1, 1954.
14. Petitioners' Stipulation to Pay Costs, Damages and Expenses, filed Dec. 1, 1954.
16. Citation on Libel, with Marshal's Return, filed Dec. 13, 1954.
17. Answer to Claimants' Petition, filed Dec. 21, 1954.
19. Answer of Third Party Respondent, filed Dec. 21, 1954.
40. Claimants' Proposed Findings of Fact and Conclusions of Law, filed Oct. 6, 1955.
41. Claimants' Proposed Decree, filed Oct. 6, 1955.
42. Findings of Fact and Conclusions of Law, filed Oct. 6, 1955.
43. Decree, filed Oct. 6, 1955.
44. Exceptions to Findings of Fact and Conclusions of Law as Proposed by Substituted Third

Party Respondent and as Signed by the Court,
filed Oct. 6, 1955.

47. Notice of Appeal, filed Dec. 28, 1955.

48. Stipulation re Bond on Appeal, filed Dec. 28,
1955.

49. Designation of Documents to be Included in
Record on Appeal, filed Jan. 13, 1956.

46. Court Reporter's Transcript of Proceedings
at Hearing, filed Dec. 23, 1955.

I further certify that the following is a true
and correct statement of all expenses, costs, fees
and charges incurred in my office on behalf of ap-
pellants for preparation of the record on appeal in
this cause, to-wit: Filing fee, Notice of Appeal,
\$5.00; and that said amount has been paid to me
by proctors for the appellants.

In Witness Whereof I have hereunto set my hand
and affixed the official seal of said District Court at
Seattle this 31st day of January, 1956.

[Seal]

MILLARD P. THOMAS,
Clerk

/s/ By TRUMAN EGGER,
Chief Deputy

In the District Court of the United States, Western
District of Washington, Northern Division

No. 16054

AVON SMITH,

Libelant,

vs.

THE STEAMSHIP AMEROCEAN,

Respondent,

vs.

AMEROCEAN STEAMSHIP CO., INC., et al.,
Claimants,

vs.

ALBERT W. COPP, dba Northwest Ship Repair
Co., Third Party Respondent,

FIREMAN'S FUND INSURANCE CO.,
Intervenor.

TRANSCRIPT OF PROCEEDINGS

Before: The Honorable John C. Bowen, District
Judge.

This matter having come on for trial before the
above entitled court, on Wednesday, September 28,
1955 at 10:00 a.m.; and the libelant being repre-
sented by his proctors, Messrs. Kane and Spellman,
and claimants [1*] being represented by their proc-
tors, Messrs. Summers, Bucey & Howard and Theo-

* Page numbers appearing at foot of page of original Reporter's
Transcript of Record.

dore A. LeGros, Esquire; and Third Party Respondent and Substituted Third Party Respondent, and Intervenor being represented by their proctors, Messrs. Bogle, Bogle and Gates, and Edward S. Franklin, Esquire, the following proceedings were had and occurred:

The Court: In the case of Avon Smith, Libelant, versus The Steamship "Amerocean", her engines, etc., Respondent, American Steamship Company, Inc., a corporation, and Blackchester Lines, Inc., a corporation, Claimants, Albert W. Copp, doing business under the assumed name of "Northwest Ship Repair Co.", Third Party Respondent, are parties and their counsel ready to proceed with that trial?

Mr. LeGros: Claimant is ready, Your Honor.

Mr. Franklin: Third party respondent is ready, Your Honor.

The Court: All right, you may proceed now with your opening statement of what you think the proof will be in this action.

(Mr. LeGros opened the case to the Court on behalf of the claimant.)

(Mr. Franklin opened the case to the Court on [2] behalf of the third party respondent.)

The Court: The claimant may proceed with claimant's case in chief.

Mr. LeGros: I will call as my first witness, Avon Smith.

The Court: Come forward and be sworn as a witness.

AVON SMITH

called as a witness by and on behalf of claimant, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. LeGros): Would you state your name in full?

A. Avon Varney Smith.

Q. Your residence is where, Mr. Smith?

A. At the Roslyn Hotel, Seattle.

Q. What is your marital status?

A. What?

Q. Are you single? A. Yes. [3]

Q. What is your occupation, Mr. Smith?

A. Boilermaker rigger.

Q. Were you so engaged on August 16, 1954?

A. Was I working?

Q. Were you engaged as a boilermaker?

A. Yes.

Q. By whom were you employed on that date?

A. Northwest Ship Repair Company.

Q. On that date, did you have occasion to board the steamship Amerocean?

A. Did I board it, yes.

Q. What time of day was it you boarded the SS Amerocean?

A. Well, it was shortly after one o'clock, about one-fifteen.

Q. To whom did you report aboard that vessel?

A. To my rigger foreman, Walter Houlton.

The Court: Did you give a date, Mr. Smith?

Testimony of Avon Smith.)

The Witness: August the 16th, 1954.

The Court: You may proceed.

Q. (By Mr. LeGros): And did Mr. Houlton instruct you as to your duties? [4] A. Yes.

Q. Did anyone else instruct you on that occasion? A. No.

Q. You took all your orders from Mr. Houlton? A. I did.

Q. And what duties were you given on that occasion?

A. To lift the boom on the starboard side.

Q. And did you proceed to do that?

A. We did.

Q. Were you directed to do any work on the portside?

A. We were to go on the portside and bring the boom out on the portside.

Q. Were you directed to the portside of the vessel by Mr. Houlton? A. Yes.

Q. Did Mr. Houlton tell you in any way as to any condition of the main deck of the vessel which was unsafe? A. No.

Q. You were given no warning by him, then, of any oil on the deck? A. No.

Q. Just how did the injury to you occur? [5]

The Court: I haven't heard of any yet.

Q. (By Mr. LeGros): You received an injury on that occasion? A. Yes.

Q. How did the injury occur?

A. By slipping on the deck.

Q. Where did you step from onto the deck?

(Testimony of Avon Smith.)

Where had you been immediately prior to stepping onto the deck?

A. I'd been on top of the hatch.

Q. Tell the Court just what you did to cause the injury.

A. I went to the edge of the hatch. I sat down on the top there, put my right foot down on a bar that runs forward and aft of the hatch there, then I stepped off with my left foot, and that's when I slipped.

Q. And as a result of slipping, what were the injuries you received, if any?

A. Fractured hip.

Q. While you were standing on the hatch, Mr. Smith, did you receive any warning from Mr. Houlton as to the condition of the deck?

A. No.

Q. Was anything hollered to you by Mr. Houlton or Mr. Romos, or anyone else, in the nature of a [6] warning upon your stepping on the deck?

A. No.

Q. As a result of these injuries, Mr. Smith, you were hospitalized? A. Yes.

Q. And where were you taken?

A. To the Virginia Mason Hospital.

Q. How long were you in the hospital?

A. Oh, I couldn't rightly say, but I think it was pretty close to two months.

The Court: Which hip was broken?

The Witness: The left.

Q. (By Mr. LeGros): Following your release

(Testimony of Avon Smith.)

from the hospital, Mr. Smith, were you able to return to work? A. No.

Q. Have you been able to return to work as yet?

A. On easy jobs, yes.

Q. Have you been able to work full time?

A. No.

Q. Mr. Smith, you have an arthritic condition that existed prior to this injury?

A. Yes, I did.

Q. And what was the relation of the broken hip to the arthritis, if you know? [7]

A. Well, I had no pain in my leg before that I have now.

Q. Have you noticed any progressive fusion of your joints? A. No.

Mr. LeGros: You may examine.

Cross Examination

Q. (By Mr. Franklin): Mr. Smith, when did you go to work on the SS Amerocean on August the 16th, 1954, in the morning or afternoon?

A. Afternoon.

Q. And what time did you board the vessel?

A. About ten minutes after one.

Q. It wouldn't have been around 12:30 or earlier, would it?

A. No, it was after that.

Q. And how long were you working on the starboard side of the vessel?

A. About ten minutes.

(Testimony of Avon Smith.)

Q. I see, and had you at any time been over on the portside of the vessel before this accident?

A. No, I wasn't. [8]

Q. And when you went over to the portside, where were you standing?

A. I was on the hatch.

Q. Number one hatch?

A. Number one hatch.

Q. Forward or middle of the hatch?

A. A little aft.

Q. A little aft, and where were Mr. Houlton and Mr. Romo?

A. Mr. Romo was attaching the line into the hook he was shackling it in.

Q. Where was he standing?

A. He was on top of the hatch too.

Q. He was on top of——

A. ——of number one hatch.

Q. I see, near the winches?

A. It was close to the winches.

Q. I mean, standing on the deck, on the winches?

A. On the hatch.

Q. Where was Mr. Houlton?

A. He went in what we call in by the house, aft of Number one, and was releasing the midship.

Mr. Franklin: I think that's all. Thank you, Mr. Smith.

Mr. LeGros: That's all, Mr. Smith. [9]

The Court: You may step down, Mr. Smith.

(Witness excused.)

The Court: Call your next witness.

Mr. LeGros: I will call Mr. Houlton.

The Court: Come forward, Mr. Houlton.

WALTER HOULTON

called as a witness by and on behalf of claimant,
having been first duly sworn, was examined and
testified as follows:

Direct Examination

Q. (By Mr. LeGros): Would you give us your
full name, please, Mr. Houston?

A. Walter Houlton.

Q. And your address?

A. 9311-31st, S.W.

Q. And your marital status, please?

A. Married.

Q. You are employed where, Mr. Houlton?

A. At the present time at Commercial Ship Re-
pair in Winslow, Washington. [10]

Q. You are here in response to a subpoena?

A. Yes.

Q. Mr. Houlton, on August 16, 1954, where were
you employed?

A. Northwest Ship Repair Company.

Q. That is the organization operating as Albert
W. Copp, doing business under the assumed name
of Northwest Ship Repair Company?

A. Yes, sir.

Q. And in what capacity were you employed by
them? A. As rigger foreman.

(Testimony of Walter Houlton.)

Q. And how long had you been acting as rigger foreman for that company?

A. Well, I would judge it was five years, at least.

Q. When did you terminate your employment with that company?

A. At the death of Mr. Copp.

Q. At the death of Mr. Copp?

A. That was in March of this year.

Q. What were your duties as a rigger foreman?

A. Well, they varied. You were working in the engine room one day, and taking care of the machinery, and some days you'd be taking care of the ship's gear [11] and removing debris from the holds, and so forth.

Q. Specifically, referring to the SS Amerocean, what were your duties on board that vessel as rigger foreman?

A. On that occasion it was removal of wheat partitions that evidently existed in the ship during the voyage.

Q. And you were being directed by whom?

A. Well, the superintendent was Mr. Trout.

Q. He was the one you looked to for instructions? A. Yes.

Q. You took instructions only from him?

A. Or from Mr. Copp, if he happened to be around.

Q. And you, in turn, were responsible for men under your supervision? A. Yes.

(Testimony of Walter Houlton.)

Q. How many men did you have under your supervision that day?

A. Well, I would say eight, all told.

Q. And you gave them their work orders?

A. Yes.

Q. And so they carried out their work?

A. Yes.

Q. Was Avon Smith one of the employees of [12] that gang? A. Yes.

Q. And when did Mr. Smith report aboard the SS Amerocean?

A. Well, I know he was called for—started after lunch, but it takes a while for the crew to drive out from the yard to the Van Vetter's Dock, and as to the exact time, I can't remember.

Q. What time did you yourself arrive aboard the SS Amerocean?

A. It was around nine o'clock, I believe, in the morning.

Q. That would be nine in the morning of August 16th? A. Yes.

Q. Did you have occasion Mr. Houlton, to at any time be on the portside main deck of the SS Amerocean prior to noon?

A. Yes, between 11:30 and 11:45 a scow arrived for this debris that we were removing off the ship, and I assisted in tying it up.

Q. On that occasion, did you have any opportunity to observe the condition of the portside main deck? A. Yes.

(Testimony of Walter Houlton.)

Q. And what did you observe as to its condition? [13]

A. It was very slippery.

Q. Did you yourself slip? A. Yes.

Q. Were you injured?

A. Well, I wasn't injured, but I caught myself on the wrist—injured my wrist a little bit.

Q. Now, when you returned to work after lunch, would you say, was about 12:30? A. Yes.

Q. And shortly thereafter, Mr. Smith reported to your gang, is that correct?

A. Yes, that's correct.

Q. And what work did you direct him to do?

A. Well, we were raising the starboard boom in order to remove the dunnage from the hold, and slacking the guy line as we were going up with the boom, and that was our first line of duty.

Q. What function was Mr. Smith playing in this operation?

A. Well, he was assisting us and using the winch fall for topping the boom. They have that chain type boom, and we used one winch fall from one side to the other to raise the booms.

Q. Now, when Mr. Smith reported to you for this job, did you know it would be necessary for the portside [14] main deck to be used?

A. What do you mean by "used"?

Q. In your topping the booms, did you know you would have to use——

A. Sure, you'd have to use both sides.

(Testimony of Walter Houlton.)

Q. Did you say anything to Mr. Smith as to the condition of the deck?

Mr. Franklin: What side?

Q. The portside?

A. Not prior to the time he started to go—to step on it; I said something to him, whether he heard me, I don't know, as to its slipperiness.

Q. Prior to the immediate occasion of the injury, you had said nothing to him?

A. No, I hadn't.

Q. You were aware, however, that that side of the deck was slippery?

A. Well, sure, being aware of it by the fact that I was tying up the scow there. It was at that time that I went up to the first mate's room and talked to someone that was in there—whether he was the first mate or not, I don't know—as to the existing condition, and that it should be taken care of.

The Court: I think it would be better if you would relate what you said to him and what he said [15] to you, and whether anyone else was present, and the specific place the two of you were at, at the time the conversation was made.

Mr. LeGros: I will try, in asking a question—

The Court: At this time the Court will take a ten-minute recess.

(A ten-minute recess was declared.)

Mr. LeGros: May the reporter read the last question and answer?

The Court: That will be done.

(Testimony of Walter Houlton.)

(Reporter read last question and answer,
page 15, lines 16-23.)

Q. (By Mr. LeGros): You don't know who you talked to, Mr. Houlton?

A. No, I went to the mate's room though. It was one of the ship's officers, I imagine.

Q. But you don't know?

A. Not exactly, no, I don't.

The Court: Are you sure of that, Mr. Houlton?

The Witness: Yes, sir.

The Court: And you say you don't recall which room you went to?

The Witness: I was to his room, but as to what man, what his job was—I assumed he was one [16] of the officers, and he said it would be taken care of.

The Court: You may proceed.

Q. (By Mr. LeGros): Mr. Houlton, what was the condition of the ship as to its crew, at that time, if you know?

A. They were in a state of confusion, due to the fact they were paying off, and there was quite a lot of evidence of partying around.

Q. The shipping commissioner was aboard, was he not? A. Yes.

Q. And they were paying off, at that time?

A. Yes.

Q. And that was prior to noon?

A. No, I don't know whether he was aboard yet or not, but I think he was, because I heard him remarking that they were paying off.

Q. That was prior to noon? A. Yes.

(Testimony of Walter Houlton.)

Q. You say on that occasion that you requested sawdust? A. Yes, sir.

Q. You knew that sawdust could be spread on deck to make it safe? [17]

A. To make it so you could walk, at least.

Q. You knew that could be done?

A. Yes.

Q. Where you then in the vicinity of the port and starboard main deck around No. 1 hatch for the rest of the time up to the injury?

A. No, I was down the hold, prior to that, and when they told me the scow was arriving, which I tied up.

Q. And that was about 11:30?

A. 11:30 to 12, somewheres in there.

Q. Then you went to the main deck in the location of the injury—where it occurred?

A. Not before dinner, I didn't.

Q. And you said you slipped on the main deck yourself?

A. Yes, in tying up the scow I slipped, yes.

Q. Then after lunch you were working around the main deck then right up at No. 1?

A. That's right.

Q. And on that occasion did you have an opportunity to walk around that portion of the ship?

A. No, because we were taking care of pumping out this fore peak that was full of water, and the pump had stopped. We were using air instead of steam, or [18] anything from the pier, and we went on the pier to start the pump going again.

(Testimony of Walter Houlton.)

Q. Were you aboard the vessel when Mr. Smith arrived? A. Yes.

Q. And you were aboard the vessel when you directed him in his activities? A. Yes.

Q. How far from him were you at the time he was injured?

A. Well, I was, I would say—I would estimate thirty feet from him.

Q. You were about thirty feet from him?

A. Yes.

Q. And Mr. Romo was located where?

A. Well, I would say he was close to the hatch combing on the after end.

Q. Close to the hatch combing on the after end?

A. Yes.

Q. And approximately how many feet from Mr. Smith, if you know?

A. Within twenty feet—less than that, probably, about fifteen feet.

Q. When did this barge tie up off of Number 1?

A. Well, that was prior to dinner. [19]

Q. Prior to dinner? A. Yes.

Q. And what was the condition of the deck portside in the vicinity of No. 1 hatch prior to lunch, if you know?

A. Well, like I told you, it was slippery.

Q. Had you been in that vicinity, immediately prior?

A. That's where we tied the scow up.

Q. And you say you slipped in the vicinity of No. 1 hold? A. Yes.

(Testimony of Walter Houlton.)

Q. That was in the same general area as Mr. Smith's injury took place? A. Yes.

Mr. LeGros: You may examine.

Cross Examination

Q. (By Mr. Franklin): Mr. Houlton, when was the first time that you were in the vicinity of the portside of No. 1 hatch on the day of Mr. Smith's accident?

A. Just prior to lunch, between 11:30 and 12, I don't know the given time. That's when the scow arrived. [20]

Q. No work had been performed by your employees on the portside prior to noon?

A. No, we'd been in the hold, taking care of things there.

Q. And what did you find the condition of the portside deck to be in at that time when you fell?

A. There was slippery oil that had been placed on the deck.

Q. And did you feel that that condition should be remedied?

Mr. LeGros: I object to that, if the Court please.

The Court: That state of mind question, the last one, the objection to that is sustained.

Q. (By Mr. Franklin): What did you feel should be done, if anything?

Mr. LeGros: I will object to that—same objection.

The Court: That objection is sustained. You can

(Testimony of Walter Houlton.)

ask him what he did, or what he said to anyone representing the ship.

Mr. Franklin: He's a foreman, Your Honor, and should be entitled to testify.

The Court: It is not material to what he felt, if he didn't communicate it to somebody. [21]

Q. (By Mr. Franklin): What is the usual corrective mechanism applied to a slippery oily deck?

A. When we have our vessel over at Pier 29 or 30, where we did some of our work from the port pier, we had sand and also salt and sawdust stored on the pier that we used for oily conditions, like if we were pumping bilges, and some spilled on the deck, and we soon took care of it.

Q. How far away was this sand and sawdust from the Amerocean?

A. Well, that's miles away, but——

Q. Where was it stored?

A. It was stored both at Pier 29 there, at that time, and also in our own shop.

Q. Where was your shop located at?

A. It's on 1st Avenue South, I believe.

Q. Then you stated that you went to the First Mate's quarters? A. Yes, sir.

Q. How soon after you fell?

A. Well, right after I tied up the scow I went up there.

Q. Did you talk to the officer occupying the First Mate's quarters? [22]

Mr. LeGros: I object to that, if the Court please.

The Court: Why?

(Testimony of Walter Houlton.)

Mr. LeGros: The form of the question, "Did you talk to the officer occupying the First Mate's quarters?"

Mr. Franklin: I will rephrase it.

Q. (By Mr. Franklin): Did you talk to the officer in the First Mate's quarters?

A. I talked to a given person that was in there.

Q. And what did you say to him?

A. I said the deck was very slippery, and if it was possible, we would like sawdust to plant around on the deck, so we could navigate and walk around on it.

Q. What did this officer say in reply?

A. He said, "We'll get some."

Q. Did he tell you they had a supply on the vessel? A. I couldn't say as to that.

Q. After you had this conversation with the man, then where did you go? A. Out to eat.

Q. And you came back to the vessel about what time? [23]

A. Well, it was either shortly after 12:30, or around that time.

Q. And at that time, was Mr. Smith aboard the vessel, or did he come aboard subsequently?

A. No, he came in after that.

Q. Now, you were asked by counsel why you didn't tell Mr. Smith that you had determined that the portside of the deck was slippery and unsafe. Why didn't you tell him when he came aboard?

A. I naturally assumed——

Mr. LeGros: I object to that; it's an assumption.

(Testimony of Walter Houlton.)

Mr. Franklin: I don't think so. He has been asked whether he notified Mr. Smith, and I am entitled to ask why he did not notify him.

Mr. LeGros: The form of the question asks for the state of mind on the part of the witness.

The Court: The objection is sustained.

Mr. Franklin: Your Honor he is holding that I am not entitled——

The Court: It's the state of mind.

Mr. Franklin: I am not asking for the state of mind, but he has a reason why he [24] didn't do it.

The Court: The reason will have to be drawn by the Court, and the Court is trying to hear the testimony as to what he did with respect to notifying the ship's representatives, and what was said by him to the ship's representatives, and what was said by the ship's representatives to him.

Q. (By Mr. Franklin): Mr. Houlton, at any time before Mr. Smith's accident, were you notified by the ship's officers that the sawdust had not been placed on the portside of the foredeck of the SS Amerocean? A. No.

Q. Were you present at any time on the portside of the vessel prior to Mr. Smith's accident, after you came back from lunch? A. No.

Q. Where were you standing at the time of Mr. Smith's accident?

A. Right directly to the stern of the winch where the midship guy was made fast—it was on the mast table.

(Testimony of Walter Houlton.)

Q. And after Mr. Smith's accident, what did you do about procuring any sawdust? [25]

Mr. LeGros: I object to that, if the Court please. It's calling for events happening after the accident occurred.

The Court: Well, if it's something that happened—relating to what change in conditions——

Mr. LeGros: Yes, Your Honor.

Mr. Franklin: I think I have a right to show if the condition is changed here, in furnishing a safe place to work. I am showing that immediately after we ascertained that the man had not strewn the sawdust, that we sent for sawdust on our own hook.

The Court: If that is——

Mr. LeGros: My objection would go to that, if the Court please.

The Court: Does it relate to improving the premises afterwards, and involve the question of whether or not events may be improved by changing the premises after the accident?

Mr. Franklin: No, Your Honor, the events merely go to show that after the accident that Mr. Houlton then requested leave to go into town and get sawdust [26] and bring it back. That bears on the reasonableness of the conditions of the North-west Ship Repair Company.

The Court: The objection is overruled. I do not wish to receive, inadvertently or otherwise, any evidence of the actual change in the condition, in order

(Testimony of Walter Houlton.)

to overcome the alleged conditions, unless you show immediate authority for it.

Mr. Franklin: I understand, Your Honor, and I don't think this is objectionable from that standpoint, because it merely shows what we did.

Q. (By Mr. Franklin): Would you tell the Court what orders you gave with reference to any corrective measures?

Mr. LeGros: I object to that, if the Court please —“corrective measures.”

The Court: Objection sustained.

Q. (By Mr. Franklin): Would you tell the Court what you did, if anything, to procure any supplies for the deck?

A. Well, right after the accident——

Mr. LeGros: Objection——

The Court: Right after the accident? [27]

Mr. Franklin: Yes, Your Honor.

The Court: The objection is sustained.

Q. (By Mr. Franklin): Now, Mr. Smith——

The Court: I will be very glad to consider, if you care to give me authorities for it. It may be you've got some authorities——

Mr. Franklin: I don't have any at this time.

The Court: ——by which you are entitled, expressly, to show that the condition of the alleged slipperiness was purposely and knowingly changed immediately subsequently after the accident, and improved. I will be glad to go into it further if you will show me some authorities.

Q. (By Mr. Franklin): Mr. Houlton, you stated

(Testimony of Walter Houlton.)

on direct examination that the ship was in confusion at the time of Mr. Smith's accident, and there was partying around. Will you state what you meant by "partying around"?

A. Well, you could notice it——

The Court: No, he wants you to explain that phrase.

The Witness: "Partying around"? [28]

Q. (By Mr. Franklin): Yes, what you found as to partying around.

A. Oh, they had a few bottles of beer, and so forth, and——

Mr. Franklin: That's all. Thank you.

Redirect Examination

Q. (By Mr. LeGros): The members of the crew, Mr. Houlton, were being paid off?

A. Yes, sir.

Q. They were signing off?

A. I imagine they were; they said they were.

Q. Paying off articles, in effect—they were off the payroll, as you said, is that correct?

A. I imagine—I don't know whether they were off the payroll or not.

Q. That's the customary purpose in signing off, is it not?

A. But that doesn't mean they are off the payroll. I have signed off and on many a time.

Mr. LeGros: That's all. Thank you.

The Court: Step down, Mr. Houlton.

(Witness excused.) [29]

Mr. LeGros: I will call Mr. Romo.

CLAUDE RAYMOND ROMO

called as a witness by and on behalf of claimant, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. LeGros): Will you state your name in full? A. Claude Raymond Romo.

Q. Your address, Mr. Romo?

A. 10129—South 66th Street.

Q. Your marital status? A. Married.

Q. You are here in response to a subpoena?

A. Yes, sir.

Q. On August 16, 1954, Mr. Romo, by whom were you employed?

A. Northwest Ship Repair Company.

Q. That is the company that is named in the pleadings as Albert W. Copp, doing business as Northwest Ship Repair Company? [30]

A. Yes.

Q. About how long had you been employed by them?

A. Oh, approximately fourteen months.

Q. Was that fourteen months prior to this accident? A. Yes.

Q. And how long did you remain in their employ after the accident?

A. Two or three months, I don't recall exactly.

Q. What was the nature of this employment?

(Testimony of Claude Raymond Romo.)

A. I was a boilermaker foreman.

Q. How long had you been a foreman for this company?

A. All the time I was with the company.

Q. And your duty as boilermaker foreman was what, Mr. Romo?

A. Well, repairing boilers and fittings—steel—change of burners and welders.

The Court: Does that boilermaker term or classification of occupation include rigging, so-called?

The Witness: Yes, Your Honor, they have riggers come under the Boilermakers' Local, and they are therefore included in that.

The Court: Proceed. [31]

Q. (By Mr. LeGros): Mr. Houlton was also a foreman? A. Yes.

Q. And your duties complemented each other, I take it? A. Yes.

Q. And who was in charge of the work aboard the SS Amerocean that day?

A. Barney Trout, the supervisor.

Q. On that day, Mr. Romo, prior to the accident of Mr. Smith, did you have occasion to become familiar with the condition of the main deck port-side in the vicinity of Number 1 hatch?

A. Only at the time that I helped tie up the scow that came alongside.

Q. And when was that, please?

A. At approximately 11:30, in that neighborhood.

Q. That is 11:30 on the 16th of August of 1954?

(Testimony of Claude Raymond Romo.)

A. Yes.

Q. And was that in the general vicinity of the area where Mr. Smith fell later that day?

A. Yes, alongside of Number 1 hatch; the scow was tied up there.

Q. What was the condition of the main deck there, as you found it? [32]

A. On the portside?

Q. Yes.

A. It was covered with oil or grease, and it was slippery.

Q. Did you make any comment of that condition to anyone, at that time?

A. I don't recall offhand, but when Mr. Houlton slipped when we were tying up the scow, we might have made some remark, or I may have told him about the condition then.

Q. Did you feel that the condition of the deck at the time was safe for use by the personnel of the company? A. No.

The Court: I think you should ask him if he knows what the condition of the deck was; what he feels it was is not a proper question.

Mr. LeGros: I think I previously asked him.

The Court: You asked him if he felt it was safe. The Court strikes the question as not proper form.

Q. (By Mr. LeGros): What was the condition of the deck as you found it on that occasion? [33]

The Court: If you observed the condition.

A. Yes, I would say the deck was slippery.

Q. Was the deck——

(Testimony of Claude Raymond Romo.)

The Court: State if you know, so and so, or something like that.

Q. (By Mr. LeGros): If you know, Mr. Romo, was the condition of the deck, at that time, safe for use?

Mr. Franklin: Objection——

The Court: The objection is sustained. It would be competent to state, if he knows, what the condition was with respect to the work, and its adaptability to the work.

Q. (By Mr. LeGros): Mr. Romo, can you tell us what the condition of the deck was at that time, with relation to the nature—with respect to the type of work necessary to perform your type of work aboard ship?

A. I would say it was too slippery to work on.

The Court: Do you wish the Court to know from this witness what were the elements contributing, if he knows, to the conditions?

Mr. LeGros: Yes, Your Honor.

Q. (By Mr. LeGros): And what was the nature of the substance on the [34] deck which caused the slipperyness?

The Court: If you know, or if you observed it.

A. It was what they call fish oil on the deck.

Q. Do you, from your own knowledge, know what that is?

A. No, not offhand, no, I don't.

The Court: State, if you know, why it is applied to the deck?

(Testimony of Claude Raymond Romo.)

The Witness: It acts as a rust preservative, I believe.

Q. (By Mr. LeGros): And all around that time, prior to noon, had you or Mr. Houlton ordered sawdust from your company?

A. I believe that Mr. Houlton had. I don't know whether I had ordered it—we'd mentioned something about we should have sawdust for the deck.

Q. And did he say where he was going to get the sawdust?

A. No, but I naturally know that he had ordered it from our office.

Q. Do you know if sawdust was ordered prior to noon? A. No, I couldn't say.

Q. You had discussed that with Mr. Houlton, however? [35] A. Yes.

Q. Where were you standing at the time Mr. Smith reported for work in the vicinity of this Number one hatch?

A. When he reported for work, I believe I was on the starboard side of Number 1 hatch.

Q. And do you know the nature of the work that he was undertaking? A. Yes.

Q. Did you know that it would be necessary for him to use the portside? A. Yes.

Q. Did you in any way give him any warning as to the condition of the portside? A. No.

Q. Do you, to your knowledge, know whether Mr. Houlton gave him any warning?

A. No, I couldn't say.

Q. How far were you standing from Mr. Smith

Testimony of Claude Raymond Romo.)

At the time he stepped off the hatch cover on the portside of the main deck?

A. About 15 to 20 feet, in that neighborhood. I was standing aft of the hatch.

Q. Did you hear any warning being shouted at the time he stepped off? A. No, I didn't.

Q. You heard no warning?

A. No, I didn't.

Mr. LeGros: You may examine.

Mr. Franklin: No questions.

The Court: Step down, Mr. Romo.

(Witness excused.)

The Court: Call the next witness.

Mr. LeGros: I would like, at this time, if the Court please, to introduce the testimony of Edward J. O'Neill, taken by deposition on May 13, 1955, pursuant to written stipulation of the parties.

The Court: It is in under the same cover as that of Leo Morrissey, is it not?

Mr. LeGros: No, not under the same cover. I will ask that that deposition be published.

The Court: Let the record show the Court does now publish all depositions previously received by the clerk, in this case. I have before me a deposition entitled: "Deposition of Edward J. O'Neill
* * " You may proceed. I wish you would skip—

Mr. LeGros: I think we can go down to page 2 of the direct examination.

The Court: You may proceed. [37]

“EDWARD J. O’NEILL

having been first duly sworn on oath, was called as a witness in behalf of the respondents, and testified as follows:

Direct Examination

Q. (By Mr. LeGros): Would you state your name, please? A. Edward J. O’Neill.

Q. And what is your home address, Mr. O’Neill?

A. 770 Ocean Avenue in Brooklyn, New York.

Q. What is your occupation?

A. I sail on the ship as Chief Mate.

Q. How long have you been Chief Mate on the Amerocean? A. Since about June, 1954.

Q. And were you Chief Mate on the voyage from the Far East to Seattle in August of 1954?

A. I was.

Q. Mr. O’Neill, what are the duties of Chief Mate on board a vessel such as the Amerocean?

A. Well, it might be a large story. I am chief of the three mates. I take care of the ship’s work in addition to standing watch and navigation watch.

Q. Is it part of your duties to see to the maintenance of the ship’s equipment such as gear and tackle? A. That’s right. [38]

Q. How about the general over-all housekeeping of the ship, decks and that?

A. The decks outside and all of the cargo gear and certain parts of the inside of the ship I take care of.

Q. Then you have charge of the maintenance of the decks? A. That’s right.

Q. Do you recall whether or not any portion of

Deposition of Edward J. O'Neill.)

Q. The decks of the Amerocean were oiled with fish oil on the voyage from the Far East to Seattle in August?

A. Yes, I do.

Q. And what portion of the deck was oiled?

A. The port side, forward.

Q. And that is what side of the ship?

A. It's the lefthand side looking forward.

Q. And what portion of the deck was oiled at that time?

A. Well, from the extreme bow to the—I'd say the after end of Number 3 hatch.

Q. And what sort of preparation did you cause to be put on the deck?

A. Oh, a combination of fish oil, lamp black, and Japan dryer.

Q. Could you tell us about what proportions you used in this mixture? [39]

A. About 20 gallon of fish oil, 4 or 5 gallon of dryer, and maybe ten packages of dry lamp black.

Q. And that was applied to the deck how, Mr. O'Neill?

A. We may use swabs. I get my voyages mixed up. This particular voyage I think we used—I'm not sure whether we used swabs or rollers. We use different ones.

Q. And who applies this mixture to the deck?

A. The men on deck, my sailors.

Q. Do you recall when that portion of the deck was oiled?

A. I believe it was on the 3rd of what, July, August—when did the accident happen?

(Deposition of Edward J. O'Neill.)

Q. The accident was August 16th.

A. Well, it was about four days after leaving Pusan.

Q. Now, the accident report says August 3, is that about the date?

A. That's about the day. I'm not sure of the day.

Q. Now, with this mixture that you used, how many days would you estimate that it would take for this mixture to dry?

A. Under good weather conditions it would dry in maybe three or four days, but under these conditions, I know what I was up against with rain and fog up ahead of me, and I use extra dryer, and it would [40] take maybe 8 or 9, ten days.

Q. Do you recall whether or not that portion of the deck was in use following the application of this mixture? A. Immediately after?

Q. Immediately after. A. No.

Q. When was it put in use?

A. It was before our arrival in port, about two days or maybe one day before, I topped booms.

Q. What do you mean when you top booms?

A. I raise my booms, spread the guys, got lines on deck prepared for port.

Q. And you did that with the ship's personnel?

A. With the ship's personnel.

Q. And did the ship's personnel use this portion of the deck that had been oiled? A. They did.

Q. Was there any trouble caused by use of that portion of the deck? A. No, sir.

(Deposition of Edward J. O'Neill.)

Q. Did you personally examine that portion of the deck prior to the use of it by the men?

A. I did.

Q. In your opinion was that deck safe for their use? [41]

A. I think so.

Q. Now, Mr. O'Neill, what type — kind of weather did you have on the trip from Pusan?

A. We had foggy, rainy weather as far as I remember.

Q. Why was it that you had oiled only that portion of the deck that was oiled?

A. Because the port side was slow in drying and the weather we had from then on didn't permit me to put oil on a wet deck, and I stopped early because I wait 'til one side gets dry before I do the other. I keep one side always open.

Q. Now, when your men were using the forward port side to top the booms, was there any necessity for the application of sawdust to that deck?

A. No, sir.

Q. On the 16th, if you can recall, Mr. O'Neill, what type of weather did you have in Seattle? If you wish to refer to the logs, why they are before you.

A. I don't think I need it. It rained during the night and it rained in the morning. I'm quite sure, and I think it stopped at around 12 or 1 o'clock, stopped raining, somewhere around there.

Q. Now, a deck that has been recently fish oiled, will that have a different appearance from a deck that has not been oiled? [42]

(Deposition of Edward J. O'Neill.)

A. I think so.

Q. What is the difference in the two surfaces by appearance?

A. Well, I might say this, as oftentimes—if I may say this.

Q. Go ahead.

A. Oftentimes being on the bridge looking to see what work you're going to do on the day, generally in the morning I am on watch from 4 o'clock every morning 'til 8 o'clock, and generally in the morning, I look for whether the day is going to be good or bad to see how I can do work on the deck, because you can't do the same type work if it's rainy or wet and there is a distinct difference between a deck that is oiled with water on it from the look of it, and a deck that is not oiled.

Q. What is the difference in appearance?

A. Well, I would say that the water as it hits, it runs down the deck a little differently, the rain water.

Q. Is there any difference in the color of the deck?

Mr. Kane: I object to that question on the ground that it's leading.

Q. (By Mr. LeGros): You may answer. Go ahead. [43]

A. Is there a difference in the color of the deck?

Q. Yes. A. In this particular case, yes.

Q. And what is the—why is that?

A. Because the part that is oiled is black and the part that is not oiled is rusty, it's red, sort of.

(Deposition of Edward J. O'Neill.)

Q. Now, when is it that you first heard of this accident to Avon Smith? A. When?

Q. Yes.

A. I might say immediately after the accident.

Q. And where were you at that time?

A. I was in the saloon.

Q. And who were you with at that time?

A. I was with—well, I was with the captain.

Q. And what were you engaged in at that time?

A. In assisting him paying off, may have been transportation, it may have been—it was a payoff, but I'm not sure, but I was there watching the money, you know.

Q. And who reported the accident to you, if you recall? A. The stevedore boss.

Q. Do you recall his name?

A. No, I don't.

Q. Did you make the log entry on the 16th? [44]

A. I did.

Q. Could you refer to that entry? Who was the party that made the report?

A. Walter Houlton.

Q. And what was his capacity?

A. He was a rigger foreman.

Q. Had you previously had any conversation with this party prior to this?

A. I probably had at some time during the day.

Q. Had anyone representing the company that was aboard with the riggers made any request to you for any sawdust to put on the deck?

(Deposition of Edward J. O'Neill.)

Mr. Kane: I object to that on the ground that it is leading.

The Witness: Shall I answer?

Q. (By Mr. LeGros): Answer it.

A. No.

Q. Had anyone representing anyone other than ship's personnel made any request for such material?

Mr. Kane: I object to that on the ground that it is leading.

Witness: Would you mind repeating that question?

Q. (By Mr. LeGros): My question was, had anyone other than ship's [45] personnel made any request of you for sawdust or any other material to spread on the deck?

A. No, not until this time.

Q. When did the riggers first come aboard?

A. May I refer to this again?

Q. Yes. A. 8:30.

Q. It's 8:30 in the morning? A. Yes.

Q. Do you recall whether or not the riggers would have had any occasion to use the portion of the deck that we will refer to as the oiled portion prior to the time of this accident?

A. I would think so.

Mr. Lister: We move to strike that as not being responsive to the question and obviously a conclusion of the witness.

Q. (By Mr. LeGros): What had they been engaged in doing aboard the ship?

Deposition of Edward J. O'Neill.)

A. Again may I refer to this? I have forgotten now. Well, reading from the log——

Mr. Lister: May I ask this, Mr. O'Neill, you don't have any independent recollection at all of what the riggers [46] had been doing prior to the time this man got hurt?

Witness: Oh, well, I have. I know the reason they were aboard and I know what transpired that morning, but the thing is, if I can't say—and can't say——

Mr. Lister: Well, if you know.

Witness: Who was on this ship?

Mr. Lister: You can say what you know.

Witness: Yes.

Mr. Lister: I thought you said you didn't know and you had to look at the log to——

Witness: Well——

Mr. Lister: You were reading from the log.

Witness: Well, I won't read from the log. I didn't read it yet, but the thing is this, I had to look to see if it was the time when they came aboard, but I want to say this, that it hasn't been brought out here to my knowledge, that at this time there was a captain and one mate on the ship that was working, one mate, that was me, and a [47] chief engineer and a first assistant and I think two firemen were down to keep the steam up, but actually working on the payroll for this day, there was the captain and myself and a chief engineer and the first assistant engineer, and that was all, so we were tying the ship up, and as you know we

(Deposition of Edward J. O'Neill.)

have many duties at that time for a couple men.

Q. (By Mr. LeGros): Do you know, Mr. O'Neill, what the Northwest Ship Repair men were doing aboard the ship? A. Yes.

Q. What were they doing?

A. Dismantling grain fittings and removing the property of the former charterer, States Steamship Company, and returning the ship to the owner in the same condition it was to be found in.

Q. What portion of the ship's main deck would be used by them for that purpose?

A. Well, they were working in number 4 hatch, and therefore used that part of the ship, the after end of the ship, and the passageway up to number 1.

Q. Would that include the portion of the deck we have [48] referred to as the oiled portion?

A. I would say so.

Q. When was the first time a request was made of you for sawdust? A. After the accident.

Q. And by whom was that request made?

A. By this foreman, Walter Houlton.

(In Accordance With a Stipulation of Counsel, Lines 5-12 on Page 12 Were Deleted.)

Q. Did Mr.—what did Mr. Houlton say to you in reporting the accident?

A. He told me that a man had just broken his leg and that he had been removed from the vessel and I said—I figured this took a long time, and I said when did he break it, and when did he get off, and he said, "I helped him." When they sent him

(Deposition of Edward J. O'Neill.)

to the hospital, that was the first notice that I had that he had injured himself.

Q. Do you recall making an examination of that port side with the captain later in the day?

A. I do.

(In Accordance With a Stipulation of Counsel, Lines 23-30, Page 10, Were Deleted, and Lines 1-17 on Page 11.)

Q. In your opinion had the fish oil on that portion of it dried prior to August the 16th? [49]

Mr. Kane: I object to that question on the ground that it calls for an opinion.

Witness: Do I answer?

Mr. LeGros. Yes.

Mr. Lister: Further, that the gentleman has shown no qualification to answer a question calling for a conclusion.

A. No, to speak truthfully, I can't say that the entire deck was entirely free of dampness because of oil.

Q. That was a condition, Mr. O'Neill, that would be——

Mr. Kane: I object to that question on the ground that it is a statement of counsel rather than a question.

Mr. LeGros: I haven't asked the question yet.

(In Accordance With a Stipulation of Counsel, Lines 4-14, Page 12, Were Deleted.)

(In Accordance With a Further Stipulation, Lines 15-30, Page 12, Were Deleted, Also Pages 13-32.)

(Deposition of Edward J. O'Neill.)

Cross Examination

Q. (By Mr. Kane): At no time did you discuss with these rigger shore gang the condition of the port side of the vessel that had previously been oiled? [50]

A. No, sir.

Q. You never warned them or told them?

A. It was never brought up by anybody.

Q. You never put any signs up?

A. No signs.

Q. Or roped that area off? A. No rope.

Q. Isn't it customary when you go into dry dock or when you oil a vessel, do you leave a pathway that hasn't been oiled or do you rope the oiled portion off or put up some warning signs?

A. I'd say no, unless we had some particular fresh paint job, we want to keep people off, put up rope, even aboard ship, with a crew aboard, we don't put up signs to tell them it's fresh paint or something like that.

Q. But you leave an area dry?

A. At certain times we do. It depends on whether they must have entrance and exit from certain places.

Q. Don't you put up signs that a deck is oiled or slippery, "keep off," "Paint" or "wet"?

A. No, we don't.

Q. You never do that? A. No, sir.

Q. You never rope off an area that's been painted or oiled? [51]

A. When it's fresh in certain places I would, and I have.

(Deposition of Edward J. O'Neill.)

Q. But at this time you didn't discuss anything with that shore gang that it was wet?

A. No discussion with them about the oil on deck or anything of that sort, and they just came on the deck via the starboard side and then worked around the winches and the booms.

Q. And they would step over to the port side, is that correct?

A. I've got to say something to you about the starboard side and the port side. Now, to open a hatch up you must——

Q. Why don't you just answer your questions.

A. Yes.

Q. They would come on the starboard side to get aboard ship and then they had access to the entire deck.

A. Yes.

Q. Ordinarily when a man was working on the starboard side he wouldn't see the oiled section of the port side.

A. Oh, yes, he would.

Q. Unless it was called to his attention, he wouldn't notice that it had been previously oiled.

A. Well, the ship isn't that broad. It's only 85 foot in width. [52]

Q. Now, at this time——

A. And you certainly can see the deck on the other side.

Q. I mean if he were engaged in trimming this boom or something like that, there is a possibility he might not see it, or notice it.

A. There is a possibility that he might not see it.

(Deposition of Edward J. O'Neill.)

Q. Or rather see the condition of the deck.

A. To me he'd have to see it."

Mr. Franklin: That's all if the Court pleases.

The Court: This deposition, as to the parts read, is now received in evidence as a part of the case in chief of the respondents and cross libelants, Black-chester Lines, Inc., and the Amerocean Steamship Company, Inc., against the third party respondent, Albert W. Copp, doing business under the assumed name of Northwest Ship Repair Company. Is there anything else to be said?

Mr. LeGros: I wonder—it has come to my attention that there is necessity for a substitution of parties as to the identity of the third party respondent.

The Court: Mr. Copp?

Mr. LeGros: Yes, the probate is pending in the Superior Court of King County. Albert W. Copp, Jr., is the executor of the estate. I would like, at this time, to substitute him as executor.

The Court: You need some proof of his death, something to show——

Mr. LeGros: Mr. Franklin has stipulated with me on that.

Mr. Franklin: If the Court pleases, Your Honor may require certified copies, but I have stipulated that because of the death of Albert W. Copp, that his son may be appointed in his stead as the third party respondent.

The Court: And you believe his name to be Albert W. Copp, Jr.?

Mr. Franklin: Yes.

The Court: That stipulation is approved, and so ordered that such substitution be made. You may proceed. Is there anything else to be said or done?

Mr. Franklin: Yes, I take it, Your Honor, it is now the third party respondent, now presenting his case, and third party respondent moves the evidence will be a document, which [54] we desire to have marked.

The Court: The third party respondent will now proceed.

(Respondent's Exhibit No. A-1 marked for identification.)

The Court: As I understand it, these two claimants and respondents and cross libelants have rested their case?

Mr. LeGros: Yes.

Mr. Franklin: If the Court please, respondent and third party respondent offers in evidence respondent's Exhibit A-1, being a certified copy of the weather report of August the 16th, 1954, showing that there was precipitation or rain at 7:00 that morning, and no rain thereafter until 8:00 p.m. that evening. We offer it in evidence.

The Court: Is there any objection?

Mr. LeGros: No objection.

The Court: Admitted.

(Document previously marked Respondent's Exhibit A-1 for identification, now received in evidence.)

Mr. Franklin: Third party respondent rests.

The Court: Do the respondents and cross libelants rest? [55]

Mr. LeGros: We rest, Your Honor.

The Court: Are counsel ready to argue the matter? Is this all the evidence that is to come before the Court in this case?

Mr. LeGros: Yes, Your Honor.

Mr. Franklin: Yes, Your Honor.

The Court: You may proceed.

(Mr. LeGros argued the case to the Court on behalf of claimants.)

(Mr. Franklin argued the case to the Court on behalf of third party respondent.)

Oral Decision

This Matter having come on for hearing before the Honorable John C. Bowen, Judge of the above-entitled Court, on Wednesday, September 28, 1955, at 10:00 a.m., libelant appearing in person and not represented by counsel, claimant being represented by Summers, Bucey & Howard, and Theodore A. LeGros, impleaded third party respondent being represented by Bogle, Bogle & Gates, and Edward S. Franklin, all parties having been heard and all parties having rested, the Court being fully advised in the premises, thereupon rendered the following:

Oral Decision

The Court: From a preponderance of the evidence the Court finds, concludes and decides that the third party respondent did not, notwithstanding the unclear statements of one of the witnesses, ob-

ain from any representative of the ship or ship owner any promise that the fish oil slippery deck would be remedied, that the negligence of the ship and those connected with its work in creating and leaving the fish oil slippery deck condition in question, and the acts of the third party respondent in working and continuing to work in the presence of that slippery condition were concurrent and active acts of negligence. There was no passive negligence involved on the part of either the ship and/or its employees, or any of them, nor on the part of the third party respondent and/or its employees, or any of them.

The acts of negligence were concurrent. They were continuing at the time the libelant, employee of the third party respondent, slipped on the fish oil slippery deck and sustained his injury.

In this case it is not contended, as was the situation in *U.S.A. vs. Arrow Stevedoring Company*, 1949 A.M.C. 1444, that there was any specific contract of indemnity in favor of the ship owner or the ship as to any injuries which might be after the execution of such contract sustained by [57] the employees of an independent contractor like a stevedoring contractor, doing work aboard ship.

The slipperiness caused by the oil spread upon the deck by employees of the ship was just as active at the time of the accident as it was when the oil was first applied. At the moment of the occurrence of the accident the negligence of the third party respondent was in all respects active. It necessarily follows that the negligence of the ship in creating

and permitting to continue the fish oil slippery deck was concurrent with such negligence of the third party respondent, who by continuing the work with the knowledge of the slippery condition of the deck, continued the active effect of the third party respondent's negligence.

The rule of the *Halcyon Lines* case, 96 L. Ed. 318, and the rule of the case of *Union Sulphur and Oil Corp. vs. Jones & Son*, 195 F. (2) 93 relating to joint tort feasons, apply here and deprive cross libelant ship owner of the right to recover indemnity against the third party respondent in this case.

(Hearing Concluded at 4:15 p.m., September 28, 1955.) [58]

[Endorsed]: Filed December 23, 1955.

[Endorsed]: No. 15023. United States Court of Appeals for the Ninth Circuit. Amerocean Steamship Company, Inc., a corporation, and Blackchester Lines, Inc., a corporation, Appellants, vs. Albert W. Copp, Jr., as Executor under the Last Will and Testament of Albert W. Copp, deceased, Appellee. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed: February 3, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

In Admiralty—No. 15023

AMEROCEAN STEAMSHIP COMPANY, INC.,
a corporation, and BLACKCHESTER LINES,
INC., a corporation, Appellants,

vs.

ALBERT W. COPP, JR., As Executor under the
Last Will and Testament of Albert W. Copp,
deceased, Respondent.

APPELLANTS' STATEMENT OF POINTS

to the Honorable Judges of the above entitled
court:

Come now the appellants and pursuant to Rule
7 (6) of the above entitled court do file with the
clerk the following statement of points upon which
appellants intend to rely:

1. The trial court erred in finding and concluding that negligence of the SS Amerocean and claimants in failing to provide a safe place of work was active, continuous and concurrent with the negligence of respondent, and in finding and concluding that claimants were joint tort-feasors with respondent.

2. The trial court erred in not finding that any negligence of the SS Amerocean and claimants was passive.

3. The trial court erred in not finding that the

active negligence of respondent was the sole proximate cause of libelant's injury.

4. The trial court erred in not finding that respondent failed to discharge its obligation to refrain from doing his work on said vessel, or using any part of said vessel, negligently in any manner which foreseeably would impose liability upon said vessel or claimants.

5. The trial court erred in not entering decree as proposed by claimants allowing full indemnity against respondent.

6. The trial court erred in entering decree dismissing claimants' petition.

Respectfully submitted,

/s/ SUMMERS, BUCEY & HOWARD,

/s/ THEODORE A. LE GROS,

Proctors for Claimants and

Appellants herein

Acknowledgment of Service attached.

[Endorsed]: Filed Feb. 7, 1956. Paul P. O'Brien,
Clerk.

No. 15023

United States Court of Appeals
For the Ninth Circuit

PACIFIC OCEAN STEAMSHIP COMPANY, INC., a corporation,
and BLACKCHESTER LINES, INC., a corporation,
Appellants,

vs.

ROBERT W. COPP, JR., as Executor under the Last Will
and Testament of Albert W. Copp, deceased, *Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

BRIEF OF APPELLANTS

SUMMERS, BUCEY & HOWARD
G. H. BUCEY
THEODORE A. LEGROS
Proctors for Appellants.

Central Building,
Suite 4, Washington.

THE ARGUS PRESS, SEATTLE

FILED

APR 19 1956

PAUL B. O'BRIEN, CLERK



No. 15023

United States Court of Appeals
For the Ninth Circuit

PACIFIC COAST STEAMSHIP COMPANY, INC., a corporation,
and BLACKCHESTER LINES, INC., a corporation.

Appellants,

vs.

ALBERT W. COPP, JR., as Executor under the Last Will
and Testament of Albert W. Copp, deceased, *Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON
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United States Court of Appeals

For the Ninth Circuit

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corporation, and BLACKCHESTER LINES,
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ALBERT W. COPP, JR., as Executor under
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W. Copp, deceased,

Appellee.

No. 15023

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

BRIEF OF APPELLANTS

STATEMENT OF JURISDICTION

This action was commenced by libel *in rem* in admiralty (Tr. 3) filed in the District Court at Seattle against the Steamship AMEROCEAN seeking recovery of damages for injuries allegedly suffered by libelant, an employee of an independent contractor, while working board said vessel. Appellants filed their claim of ownership (Tr. 10) and answer to the libel (Tr. 27) and were granted leave under Supreme Court Admiralty Rule 56 to implead libelant's employer, Albert W. Copp, d/b/a Northwest Ship Repair Co., as third party respondent on a claim for full indemnity in case of recovery by libelant (Tr. 16). The third party respondent subsequently filed his answer to the impleading petition (Tr. 38). The principal action having been settled

and order of dismissal entered, the case proceeded to trial on appellants' claim for full indemnity against Albert W. Copp, Jr., who as executor of his father's estate was substituted as third party respondent upon oral stipulation of counsel approved by the court (Tr. 102, 103).

The district court had jurisdiction of the action pursuant to 28 U.S.C.A. Sec. 1333 which vests jurisdiction of all admiralty causes in the United States District Courts.

The jurisdiction of this court is based upon 28 U.S.C.A. Sec. 1291 which vests jurisdiction of all appeals from final decisions of the district courts in the Court of Appeals.

STATEMENT OF THE CASE

Edward J. O'Neill, as chief mate aboard the steamship AMEROCEAN on her voyage from the Far East to Seattle in August of 1954, in addition to other duties was in charge of the maintenance of the vessel, its decks and cargo gear (Tr. 90). On or about August 3, 1954, while the vessel was about four days out of Pusan, the mate caused the men under his command to oil the port side of the main deck from the extreme bow to the after end of the No. 3 hatch with a mixture of fish oil, lamp black and Japan dryer (Tr. 91, 92). This mixture acts as a rust preventative (Tr. 88). Because of the foggy, rainy weather which was subsequently encountered the oiled surface was slow in drying in spite of the extra dryer which was used, and the mate refrained from oiling the starboard side in order to keep one portion of the deck open for use (Tr. 92, 93). The oiled portion

had a black appearance while the rest of the forward deck was red and rusty (Tr. 94). About two days out of Seattle the mate ordered the ship's personnel to raise the booms, spread the guys and prepare for port. In doing so they used the oiled portion of the deck without difficulty (Tr. 92).

On August 16, 1954, her cargo having been discharged and her voyage completed, the AMEROCEAN was docked starboard side to the VanVetter's Dock in Seattle, Washington. Albert W. Copp, an independent contractor, doing business under the assumed name of Northwest Ship Repair Co., had been engaged to dismantle grain fittings, remove charterer's property and refurbish the ship so that it could be returned to the owner in the same condition as when originally chartered (Tr. 98). At some time between 8:30 and 9:00 o'clock in the morning the employees of the repair company under Superintendent Barney Trout came aboard and commenced their operations (Tr. 70, 71, 96). Walter Houlton, as rigger foreman, gave the necessary work orders and was responsible for eight men under his supervision, including the libelant Avon Smith (Tr. 69, 70, 71). Claude Raymond Romo was the boiler-maker foreman under the employ of the repair company, and his duties complemented those of Walter Houlton (Tr. 85).

There was no evidence tending to show that any of the ship's officers or crew were doing any work upon those portions of the ship where the contractor's work was being performed on the day in question, or that the contractor's employees did not have sole and complete charge thereof, including the forward deck, hatches,

winches, booms and other gear. To the contrary, the evidence indicated that the ship's officers and crew had finished all their work and were being paid off in the ship's saloon, as the shipping commissioner had come aboard the AMEROCEAN for that purpose in the forenoon (Tr. 74, 97).

At approximately 11:30 on the morning of August 16, 1954, a scow arrived alongside the AMEROCEAN and made fast to the port side near the No. 1 hatch in order to aid in the removal of debris from the ship (Tr. 71). Houlton and Romo both testified that during the time that the scow was being made fast to the AMEROCEAN they went onto the port side of the main deck near the No. 1 hatch to help tie up the scow and noticed that the deck was slippery (Tr. 71, 85, 86). Houlton testified that while assisting in tying up the scow he slipped on the deck and slightly injured his wrist (Tr. 72, 75). Although Houlton knew that sawdust was available and could easily have been applied to the deck to remedy the slippery condition, and had discussed it with Romo, no request for sawdust was made to the chief mate nor did Houlton or Romo do anything to remedy the situation prior to the injury in question (Tr. 75, 78, 86, 88, 96).

The libelant, Avon Smith, first reported for work aboard the AMEROCEAN at about 1:15 in the afternoon of August 16, 1954. He reported directly to his foreman, Walter Houlton, who instructed him to go onto the port side of the main deck and shift the boom out on the port side (Tr. 64, 65). In spite of their knowledge of the slippery deck neither Houlton nor Romo gave Smith any warning although both of them were within

thirty feet of him when he stepped from the No. 1 hatch onto the deck, slipped and suffered a fractured hip (Tr. 65, 66, 73, 76, 88). The first notice that any of the ship's personnel had of the accident was when Houlton went to the saloon where the mate was assisting in paying off the crew, and reported to the mate that a man had just broken his leg and had been removed from the vessel (Tr. 95, 98).

The trial court held that the negligence of the ship in creating the slippery condition and permitting it to continue and the negligence of the repair company in instructing its employees to continue work after having knowledge of the dangerous condition, were concurrent and active acts of negligence and denied the claim for full indemnity. The claimants, believing that the sole, active negligence was that of the contractor and its employees, have taken this appeal.

SPECIFICATIONS OF ERROR

1. The court erred in making that portion of Finding of Fact No. VII wherein the word "also" was used before the phrase "actively negligent" thereby implying that in addition to the unseaworthiness of the AMEROCEAN, as found in the preceding finding, the appellants were guilty of negligence and that it was active negligence.

2. The court erred in failing to find that any negligence chargeable to the appellants and the steamship AMEROCEAN was merely passive negligence as was set forth in appellants' proposed Finding of Fact No. VIII.

3. The court erred in failing to find that the active negligence of the appellee was the sole proximate cause of libelant's injury as was set forth in appellants' proposed Finding of Fact No. IX.

4. The court erred in making Conclusion of Law No. I in so far as it stated that the appellants were guilty of negligence which was active, continuous and concurrent with the negligence of the appellee and that said parties were joint tort-feasors.

5. The court erred in making Conclusion of Law No. III and in entering its final decree dismissing appellants' impleading petition with prejudice.

SUMMARY OF ARGUMENT

Since specifications of error Nos. 1, 2, 3, 4 and 5 involve the same legal principles and are based on the same facts they will be discussed together for the sake of convenience. Only one question is raised, to-wit: Did the trial court err in holding that appellants and appellee were joint tort-feasors in that each was guilty of acts of negligence which were active, continuous and concurrent and which proximately caused libelant's injuries; thereby rejecting appellants' contention that the sole, active negligence proximately contributing to Smith's injuries was that of the appellee?

ARGUMENT

I.

Appellants Are Entitled to Recover Full Indemnity from Appellee

It is well-settled law that appellants owed to Smith a non-delegable duty to supply a seaworthy ship and appurtenant appliances. Liability for breach of this duty is absolute and is not based on any concept of negligence. *Mahnich v. Southern Steamship Co.*, 321 U.S. 96, 88 L.Ed. 561, 64 S.Ct. 455 (1944); *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 90 L.Ed. 1009, 66 S.Ct. 872 (1946); *Pope & Talbot v. Hawn*, 346 U.S. 406, 98 L.Ed. 143, 74 S.Ct. 202 (1943).

In light of the foregoing legal principles appellants conceded that the port side of the main deck of the steamship AMEROCEAN was in an unseaworthy condition and that the vessel's non-delegable duty to provide Smith with a safe place to work had been breached and therefore settled his claim for a sum which appellee stipulated was reasonable (Findings of Fact Nos. IV and VI; Tr. 48).

That appellants' right to recover full indemnity from appellee, as libellant's employer, is not barred by the Longshoremen's and Harbor Workers' Compensation Act has been conclusively settled by a United States Supreme Court decision rendered subsequent to the instant case. In *Ryan Stevedoring Company v. Pan-Atlantic Steamship Company*, U.S., 100 L.Ed. (Advance) 146, 1956 A.M.C. 9, the court affirmed a judgment of the Court of Appeals for the Second Circuit granting full indemnity to the steamship company even

in the absence of an express contract of indemnity, holding that a stevedore contractor who agrees to perform the shipowners' stevedoring operations, thereby assumes the obligation to do its work properly and safely. This obligation is of the essence of the stevedore's contract and is a warranty of workmanlike service comparable to a manufacturer's warranty of the soundness of its manufactured product. For breach of this obligation the Supreme Court allowed recovery on an indemnity theory.

Cases decided by the Court of Appeals for the Ninth Circuit have likewise established that while a shipowner may be held liable in damages to an employee of an independent contractor for injuries sustained because of the unseaworthiness of the vessel, defect in equipment or failure to supply a safe place in which to work, the shipowner is entitled to full indemnity from the contractor for the amount of such damages, if the contractor, *with knowledge of such unseaworthiness, defect, or failure to supply a safe place to work*, permits its employee to work there without taking proper steps to remedy such unsafe condition. *United States v. Arrow Stevedoring Co.*, 175 F.(2d) 329, 1949 A.M.C. 1445 (C.A. 9th, 1949); *United States v. Rothschild International Stevedoring Co.*, 183 F.(2d) 181, 1950 A.M.C. 1332 (C.A. 9th, 1950); *States Steamship Co. v. Rothschild International Stevedoring Co.*, 205 F.(2d) 253, 1953 A.M.C. 1399 (C.A. 9th, 1953).

In the *Arrow Stevedoring* case, *supra*, one Williams, an employee of Arrow Stevedoring Co. was injured on a vessel owned by the United States by the falling of a heavy steel hatch cover which was insecurely held in

place by *defective dogs*. He sued the shipowner for damages, and the latter impleaded the stevedore company seeking indemnity. The district court denied such right of indemnity and on appeal this court reversed, holding that indemnity should be granted, for the reason that the contractor's negligence in permitting Williams to work near this hatch cover, *when his supervisor had full knowledge of the danger and failed to take any steps to remedy the danger* was the sole proximate cause of the injury, saying:

"It is thus apparent that Arrow's supervisor knew that the ship would do nothing about the cover of port hatch No. 4 until 'sometime' during the day shift. Assuming that this transferred to the ship, to perform sometime in the morning shift, the obligation of Arrow's contract, later considered, to raise this hatch door, *Arrow clearly owed the duty to see that none of its stevedores should work under it until the danger known to exist was removed.*

* * * * *

"The testimony is uncontradicted that in this defective condition of the dogs of the port hatch the cover could have been securely held erect by a clamp and turnbuckle attached to both starboard and port hatch doors. Such turnbuckle and gear was right there by the hatch for that purpose.

* * * * *

"On the facts we find that *the sole proximate cause of the injury to Williams was the negligence of Arrow in its use of the door with knowledge of its defects of dogs and pins. The Government in no way participated* in the wrongful use of the door, which otherwise could have been made secure in the usual manner described by Arrow's Larsen."

United States v. Arrow Stevedoring Co., 175 F.(2d) 329, 331, 1949 A.M.C. 1445 (C.A. 9th, 1949) (Emphasis added)

In *United States v. Rothschild International Stevedoring Co.*, 183 F.(2d) 181, 1950 A.M.C. 1332 (C.A. 9th, 1950) one Dillon, an employee of a contracting stevedore (Rothschild) was injured by reason of a defective brake of a winch on a vessel owned by the United States. He recovered judgment against the shipowner but the district court dismissed the shipowner's action for indemnity. On appeal this court reviewed the evidence, which showed that the stevedore's hatch-tender knew that the winch brake was defective, and had reported it to an officer of the vessel but when nothing was done to correct the defective condition the stevedore had proceeded to use the winch anyway, and held the shipowner was entitled to full indemnity, saying:

"It is clear that both the United States and Rothschild were negligent. It seems equally clear that Rothschild had warning of the defect which was the immediate cause of the accident. *With this knowledge Rothschild should not have permitted Dillon to work in this dangerous circumstance as to which it was fully informed.* The facts present the case fully within language used in the well-known case of *The Mars*, D.C.S.D.N.Y. 1914, 9 F. (2d) 183, 184: 'It may be thought that this was a proper case for dividing damages. I think not. * * * I take it that the distinction there is this: Where two joint wrongdoers contribute simultaneously to an injury, then they share the damages; *but where one of the wrongdoers completes his wrong, and the subsequent damages are due to an independent act*

of negligence, which supervenes in time, and which has as its basis a condition which has resulted from this first act of negligence, in that case they do not share; but in that case we say that the consequences of the first act of negligence did not include the consequences of the second.' "

United States v. Rothschild International Stevedoring Co., 183 F.(2d) 181, 182, 1950 A.M.C. 1332 (C.A. 9th, 1950) (Emphasis added)

In *States Steamship Co. v. Rothschild International Stevedoring Co.*, 205 F.(2d) 253, 1953 A.M.C. 1399 (C.A. 9th, 1953), one of Rothschild's employees had died from an injury received while working aboard a vessel owned by States Steamship Company as a result of the alleged defective condition of a winch handle. Suit for his death was brought against the shipowner and settlement was made because of its non-delegable duty to provide a safe place to work. The shipowner's action for full indemnity against the contractor was dismissed by the district court, but on appeal this court reversed the decree, stating in part:

"The absolute duty of a shipowner to provide a safe place for longshoremen to work may be likened to the absolute duty of a landowner to keep his premises in such condition that passers-by are not injured. When this duty is violated, the owner is liable to anyone injured whether he is at fault or not. See Prosser on Torts, pp. 602-605, and cases cited. Where the breach of this duty is caused by the acts of some third person, in which acts the owner is not a party, the owner may demand indemnity from the wrongdoer.

“Here, the shipowner and operator gave permission to a stevedore company to be named by the charterer of the vessel’s cargo space to go on the owner’s premises to earn his charterer’s profits. *A person so permitted to occupy the owner’s ship’s premises owes to the owner the duty to refrain from negligent acts which foreseeably would impose a liability on the owner and has an obligation to the owner not in pari delicto in such negligence to indemnify him for the amount he is required to pay because of such acts.*”

States Steamship Co. v. Rothschild International Stevedoring Co., 205 F.(2d) 253, 255, 256, 1953 A.M.C. 1399 (C.A. 9th, 1953) (Emphasis added)

For other authorities holding that even the negligence of a shipowner will not bar his right to recover full indemnity where such negligence is found to be merely passive or secondary see: *Barber Steamship Lines v. Quinn Bros., Inc.*, 94 F.Supp. 212 (D.C.D. Mass., 1950); *McFall v. Compagnie Maritime Belge*, 304 N.Y. 314, 107 N.E.(2d) 463 (C.A. of N.Y., 1952); *Davis v. American President Lines*, 106 F.Supp. 729, 1952 A.M.C. 818 (D.C.N.D. Calif., 1952); *Raskin v. Victory Carriers, Inc.*, 124 F.Supp. 879, 1954 A.M.C. 1899 (D.C.E.D. Penn., 1953); *Berti v. Compagnie De Navigation Cyprien Fabre*, 213 F.(2d) 397, 1954 A.M.C. 1111 (C.A. 2nd, 1954); “The Employer’s Duty to Indemnify Shipowners for Damages Recovered by Harbor Workers,” 103 U. of Pa. L. Rev. 321 (1954).

In the *Barber Steamship* case, *supra*, the court said:

“First of all, it does not follow from the fact that plaintiff here was liable to Onorato, the injured

stevedore, that plaintiff was itself guilty of any fault. Such liability may have been grounded not on any negligence of plaintiff, but on its absolute duty to furnish the stevedore with a seaworthy vessel on which to work. *Seas Shipping Co., Inc., v. Sieracki, supra*. Moreover, negligence on the part of the plaintiff, making it a tort-feasor, would not defeat recovery of indemnity in every case. Although indemnity is barred where the parties are joint tort-feasors in *pari-delicto*, it may be recovered when the tort-feasor seeking indemnity is not in *pari-delicto*, e.g., where its negligence can be considered secondary or merely passive, rather than primary and active." (Citing cases)

Barber Steamship Lines v. Quinn Bros., Inc.,
94 F.Supp. 212, 213 (D.C.D. Mass., 1950)
(Emphasis added)

In the case of *Davis v. American President Lines, supra*, the District Court for the Northern District of California stated the rule as follows:

"Both the common law and admiralty courts have recognized a right to indemnity, as distinguished from contribution, in a person who has responded in damages for a loss caused by a wrong of another. This right has been recognized in *two general classes of cases: those in which the person seeking indemnification was without fault; and those in which such person was passively negligent, but the primary cause was the active negligence of another.*"

Davis v. American President Lines, 106 F.
Supp. 729, 730, 1952 A.M.C. 818 (D.C.N.D.
Calif., 1952)

The court in *Raskin v. Victory Carriers, Inc.*, 124 F.

Supp. 879, 1954 A.M.C. 1899 (D.C.E.D. Penn., 1953) held that even though a dangerous condition aboard ship had been created by the negligence of the shipowner, it was *active negligence* for a contractor to permit its employees to work on the ship, *knowing of the dangerous condition, and relying on the chance that nothing would happen* and upheld a jury verdict granting full indemnity to the shipowner.

In *Berti v. Compagnie, Etc.*, 213 F.(2d) 397, 1954 A.M.C. 1111 (C.A. 2nd, 1954), a longshoreman sued the shipowner for personal injuries alleging unseaworthiness in that the locking device on a hatch beam was defective. The shipowner impleaded his employer seeking indemnity. On appeal the court reversed an order of dismissal entered in the indemnity action. In commenting on the employer's (American) actions the court stated in part:

“ . . . it was fully aware of the condition of the ship's equipment and failed to take proper precautions. Hence on this showing American's fault was primary; and on the record now before us Cyprien was legally entitled to indemnity for any judgment which plaintiff might ultimately recover.”

*Berti v. Compagnie De Navigation Cyprien
Fabre*, 213 F.(2d) 397, 401 1954 A.M.C. 1111
(C.A. 2nd, 1954)

The evidence in the instant case established, and the trial court found, that appellee was actively negligent in instructing libelant to proceed to work on the port side of the AMEROCEAN without warning him of the slip-

every portion of the deck, of which it had knowledge, and in failing to do anything to remedy this dangerous condition. Houlton and Romo, appellee's foremen, both knew of this slippery and unsafe condition at approximately 11:30 in the morning but did not report it to any of the ship's officers nor make use of available sawdust to prevent further slipping nor order the men under them to cease work on the slippery portion of the deck. Instead they allowed the men to continue working on the chance that nothing would happen and did not even warn Smith of the danger of which they had notice for over an hour and a half. Soon after Smith came aboard Houlton ordered him to swing out the boom on the port side.

On the basis of these facts the trial court correctly found and concluded that the appellee was actively negligent. However, appellants vigorously contend that in so far as the court impliedly found appellants were also negligent, and that such negligence was active, its finding was clearly erroneous. The appellants' fault in failing to provide a seaworthy ship and a safe place to work terminated when appellee's foremen discovered the unsafe condition. Appellants' fault was merely passive and the sole proximate cause of the libelant's injuries was appellee's supervening, active negligence in instructing the libelant to work on the port side of the deck without warning him of the known danger. The trial court therefore erred in dismissing the indemnity action.

CONCLUSION

Appellants respectfully submit that the decree of the trial court should be reversed with instructions to enter a decree granting full indemnity to the appellants together with their costs of suit.

SUMMERS, BUCEY & HOWARD

G. H. BUCEY

THEODORE A. LEGROS

Proctors for Appellants.

No. 15023

United States Court of Appeals
For the Ninth Circuit

AMEROCEAN STEAMSHIP COMPANY, INC., a corporation,
and
BLACKCHESTER LINES, INC., a corporation,
Appellants,

vs.

ALBERT W. COPP, JR., as Executor under the Last Will
and Testament of Albert W. Copp, deceased,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

BRIEF OF APPELLEE

FILED

MAY 14 1956

PAUL P. O'BRIEN, CLEF

BOGLE, BOGLE & GATES,
EDWARD S. FRANKLIN,
Proctors for Appellee.

603 Central Building,
Seattle 4, Washington.

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

BRIEF OF APPELLEE

STATEMENT OF ISSUES

Libelant brought this action for damages for unseaworthiness as the result of injuries sustained by him in Seattle, Washington, August 16, 1954, when he slipped on the oily and greasy deck of the S.S. AMEROCEAN. Libelant was employed by Albert W. Copp, doing business as Northwest Ship Repair Co.

Respondent shipowner impleaded Copp under Admiralty Rule 56, seeking indemnity. Prior to the trial of the case, and with appellee's approval, appellant settled the personal injury claim for Twelve Thousand Five Hundred Dollars (\$12,500) (Tr. 42, Findings of Fact No. VI).

In the trial of the indemnity action below, appellant stipulated in open court that the deck of the AMER-

OCEAN upon which libelant slipped was in an unseaworthy condition and it had breached its non-delegable duty to provide libelant with a safe place to work (Findings of Fact VII, Tr. 42).

The District Court held that both appellant shipowner and appellee ship repairer were negligent and dismissed appellant's third party petition for indemnity (Tr. 52).

The court said in part in its decision:

“ * * * The slipperiness caused by the oil spread upon the deck by employees of the ship was just as active at the time of the accident as it was when the oil was first applied. At the moment of the occurrence of the accident, the negligence of the third party respondent was in all respects active. It necessarily follows that the negligence of the ship in creating and permitting to continue the fish oil slippery deck was concurrent with such negligence of the third party respondent, who by continuing the work with the knowledge of the slippery condition of the deck, continued the active effect of the third party respondent's negligence. * * * ”

Appellant shipowner appeals from denial of its indemnity claim to this court.

COUNTER-STATEMENT OF FACTS

The steamship AMEROCEAN, owned by appellant, left Japan early in August, 1954, bound for Seattle where it was to be laid up. About August 13, 1954, en route, Chief Mate O'Neill ordered that the port side of the deck be fish-oiled (Tr. 90). Foggy and rainy weather was thereafter encountered, so when the vessel reached

Seattle the fish oil on the port side had not dried, making this portion of the deck very slippery (Tr. 99).

Employees of appellee Northwest Ship Repair Co. came aboard the AMEROCEAN the morning of the vessel's arrival, August 16, 1954, at 8:30 A.M. to remove grain fittings in the holds and do other work incidental to the lay up of the ship (Tr. 98) which fact was known to the officers of the AMEROCEAN. It had rained that morning at 7:00 A.M. No work had been done by appellee's employees that morning on the port side of the vessel, except between 11:00 A.M. and 11:30 A.M. appellee's foreman, Houlton, visited the port side of the vessel near No. 1 hatch to secure a barge. He observed the slippery condition of the deck in this area and slipped himself on the deck (Tr. 72).

Houlton immediately went to the first mate's room (Tr. 73) to have the ship correct the hazardous condition of the deck. He testified as follows:

"It was at that time that I went to the first mate's room and talked to some one that was in there—whether he was the first mate or not, I do not know—as to the existing condition and it should be taken care." (Tr. 73)

* * * Q. You say on that occasion that you requested sawdust.

A. Yes, sir." (Tr. 75)

* * * Q. Did you talk to the officer in the First Mate's quarters?

A. I talked to a given person that was in there.

Q. And what did you say to him?

A. I said the deck was very slippery, and if it was possible, we would like sawdust to plant

around on the deck, so we could navigate and walk around on it.

Q. What did this officer say in reply?

A. He said, 'We'll get some.' '' (Tr. 79)
This was denied by the mate (Tr. 96).

At this time the vessel was in the course of paying off. Everything on the vessel was in a state of confusion and Houlton testified that there was a lot of evidence of "partying around" on the vessel (Tr. 74).

ARGUMENT

The finding of the lower court that both appellant and appellee were jointly, concurrently and actively negligent which deprived appellant of its claim for indemnity cannot be set aside unless clearly erroneous.

McAllister v. United States, 348 U.S. 19;

Peterson v. United States (9 C.C.A.) 224 F.2d 748.

Indemnity Claim Precluded by *Halcyon* Case

Prior to the case of *Halcyon Lines v. Haen Ship Ceiling and Refitting Corporation* (1952) 342 U.S. 282, 96 L.ed. 318, 72 S.Ct. 277, the law as to the extent and amount of contribution allowable to a tortfeasor in admiralty in non-collision cases of joint negligence, was a matter of conflict in several circuits. *Halcyon* cited this court's decision in *United States v. Rothschild International Stevedoring Company*, 182 F.2d 322, as one of the conflicting decisions. In *Halcyon*, *supra*, the relative degrees of fault had been assessed at 25% to the shipowner and 75% to the shipfitter by the jury.

The Supreme Court laid down the rule in *Halcyon*,

supra, that regardless of the degrees of culpability between the tortfeasors, no contribution would be permitted in admiralty in non-collision cases until Congress legislated in the matter.

This court has since followed the *Halcyon* rule in two cases. In *Union Sulphur & Oil Corp. v. W. J. Jones and Son*, 195 F.2d 93 (1952), as in the instant case, indemnity was sought where the negligence of both shipowner and stevedore concurred. It was denied on the basis of *Halcyon, supra*. In that case, the vessel's ladder was unseaworthy because of a defective weld and the stevedore placed excessive strains upon the ladder. In that case the court said:

“ * * * We agree with the district court that upon the facts proven the court properly found that the negligence of Union Sulphur and Jones, Inc., jointly caused the injury to Marshall. Hence our decision in the *Rothschild* case is not applicable.

“The case is governed by the decisions of the Supreme Court in *Halcyon Lines v. Haen Ship Ceiling & Refitting Corp.*, 342 U.S. 282, 72 S.Ct. 277. It reversed the decision in *Baccile v. Halcyon Lines*, 3 Cir., 187 F.2d 403, a case discussed in the briefs of the parties here. * * *

In *States Steamship Co. v. Rothschild International Stevedoring Company*, 205 F.2d 253 (1953), this court permitted a claim for indemnity to be asserted by the shipowner against the stevedore where the libel alleged that the shipowner's breach of duty to provide a safe place of work for the longshoreman was *solely* caused by the act of the stevedore. The court in its discussion of the *Halcyon* doctrine, and Circuit Judge Healy in a

concurring opinion, pointed out that if the shipowner was culpable in any degree in causing the accident, *Halcyon* would bar his claim for indemnity. This case will be subsequently discussed in detail.

Indemnity Allowable to Shipowner Only Where Shipowner Without Fault

The shipowner owed libellant stevedore the absolute and non-delegable duty to furnish him with a seaworthy ship, *Seas Shipping Company v. Sieracki*, 328 U.S. 85, 90 L.ed. 1009; *Pope & Talbot v. Hawn*, 346 U.S. 406, 98 L.ed. 143. In *Sieracki* the shipowner's duty to furnish a seaworthy ship was described as "a species of liability without fault." *If such unseaworthy condition on the vessel was created solely by the negligence of the stevedore employer*, the shipowner would be entitled to indemnity from the stevedore for the technical breach of its duty of seaworthiness caused by the stevedore.

If the joint negligence of the shipowner and stevedore, regardless of degree of culpability, causes a stevedore injury and the shipowner seeks redress, contribution rather than indemnity is involved and no recovery is permissible under the *Halcyon* doctrine.

In *States Steamship Co., supra*, the court said (p. 256):

"Here it was clearly foreseeable that if the stevedore company made the ship unseaworthy, causing an injury to a stevedore employee, the owner would be liable to the employee for the full amount of his injury under the case of *Seas Shipping Company v. Sieracki*, 328 U.S. 85, 66 S.Ct. 872, 90 L.ed. 1009. The particular injury to the particular plaintiff was foreseeable as the result of the

stevedore company's negligent actions. Hence, the owner is entitled to be indemnified for this amount by the stevedore. See Rest. Torts §281, comment C."

With reference to the contribution, which is in essence what appellant is seeking in this case, this court in the *States Steamship Co.* case quoted from *Gray v. Boston Gas Light Co.*, 114 Mass. 149 as follows:

"When two parties, acting together, commit an illegal or wrongful act, the party who is held responsible in damages for the act cannot have indemnity or contribution from the other, because both are equally culpable, or *participes criminis*, and the damage results from their joint offence. This rule does not apply when one does the act or creates the nuisance, and the other does not join therein, but is thereby exposed to liability and suffers damage. He may recover from the party whose wrongful act has thus exposed him. In such case the parties are not *in pari delicto* as to each other, though as to third persons either may be liable."

The court in the *States Steamship Co.* case also referred with approval to the holding of the Second Circuit in the case of *American Mutual Insurance Company v. Matthews*, 182 F.2d 322, as illustrative of the basic differences between the right to indemnity and the right of contribution between joint tortfeasors. The *Matthews* case held that since the shipowner joined in the wrongdoing in supplying a defective appliance to the employing stevedore who used it, both parties were equally culpable and the shipowner could obtain no indemnity.

In distinguishing the facts in the *Matthews* case from those in *Rothschild, supra*, the court said:

“Here we do not have joint tortfeasors, but rather one party who is alleged to be solely at fault and another party who is alleged to be liable without fault as the result of the other’s acts.” (p. 255)

Parenthetically, there is little difference in the shipowner supplying defective equipment to the stevedore as in the *Matthews* case, *supra*, and knowingly and recklessly furnishing the stevedore with a dangerously slippery deck as in this case. In either instance, the negligent shipowner is not entitled to a bonus or windfall for his palpable breach of duty to the stevedore. Nor under the guise of an indemnity action, can he obtain contribution because of *Halcyon*.

Appellant’s stipulation in court conceding its own active negligence in failing to furnish libelant with a seaworthy vessel and the record here adequately establishes the shipowner’s breach of duty to the stevedore was not of a technical or passive character, nor an instance of liability without fault. Appellant knowingly and willfully provided libelant with an unsafe place in which to work, and after being notified of the hazardous condition of the deck failed to remedy it. Its negligence was active and continuing, and concurred with the negligence of appellee who failed to warn libelant, in proximately causing libelant’s injury. Since under the record, appellant is basically seeking contribution and not indemnity, the lower court properly denied it any relief because of the *Halcyon* and *Union Sulphur & Oil Company* cases, *supra*.

The following cases from other circuits support the lower court's denial of appellant's claim for indemnity.

Slattery v. Mara, 186 F.2d 134 (2 C.C.A.);

Hawn v. Pope & Talbot, 186 F.2d 800 (3 C.C.A.);

Torres v. Castor, 1956 A.M.C. 325 (2 C.C.A.);

Shannon v. U. S., 119 F.Supp. 706 (D.C. N.Y.);

American President Lines v. Marine Terminals Corp., 135 F.Supp. 363 (D.C. N.D., Cal.).

In a parallel factual situation to the case at bar, the United States Supreme Court in the case of *Union Stock Yards v. Chicago, Burlington & Quincy R. R.* (1904) 196 U.S. 217, 49 L.ed. 453, denied indemnity to a terminal company which negligently failed to inspect a car and discover a defective brake which injured its employee, and which car had been delivered to it by a railroad company. In holding both the terminal and railroad companies breached their duty in failing to inspect and no indemnity allowable, the court said:

“ * * * The case then stands in this wise: The railroad company and the terminal company have been guilty of a like neglect of duty in failing to properly inspect the car before putting it in use by those who might be injured thereby. We do not perceive that, because the duty of inspection was first required from the railroad company, that the case is thereby brought within the class which hold the one primarily responsible, as the real cause of the injury, liable to another less culpable, who may have been held to respond for damages for the injury inflicted. It is not like the case of

the one who creates a nuisance in the public streets; or who furnishes a defective dock; or the case of the gas company, where it created the condition of unsafety by its own wrongful act; or the case of the defective boiler, which blew out because it would not stand the pressure warranted by the manufacturer. In all these cases the wrongful act of the one held finally liable created the unsafe or dangerous condition from which the injury resulted. The principal and moving cause, resulting in the injury sustained, was the act of the first wrongdoer, and the other has been held liable to third persons for failing to discover or correct the defect caused by the positive act of the other. * * *

Cases Cited by Appellant

Neither the cases of *United States v. Arrow Stevedoring Co.*, 175 F.2d 329 (9 C.C.A.), nor *United States v. Rothschild International Stevedoring Company*, 183 F.2d 181 (9 C.C.A.), support appellant's claim for indemnity. Several factors distinguish the *Arrow* case *supra*, from the one at bar. First the court said (p. 331):

"The testimony is uncontradicted that in this defective condition of the dogs of the port hatch the cover could have been securely held erect by a clamp and turnbuckle attached to both starboard and port hatch doors. Such turnbuckle and gear was right there by the hatch for that purpose."

Secondly, the owner (United States) did not have knowledge of the situation, and thirdly, there was an express contract of indemnity. The court held as follows (p. 331):

"On the facts we find that the sole proximate cause of the injury to Williams was the negligence

of Arrow in its use of the door with knowledge of its defects of dogs and pins. The government in no way participated in the wrongful use of the door, which otherwise could have been made secure in the usual manner described by Arrow's Larsen.

* * *

“Arrow's contract with the government provides for its liability to the government for such sole negligence in the following language;

“‘Article 26. Liability and Indemnity (b) The contractor shall be liable to the Government for any loss or damage * * * etc.’”

In *Rothschild, supra*, the shipowner supplied a defective winch, and made unsuccessful attempts to repair it upon the complaints of the stevedore. With knowledge of its defects, the stevedore foreman permitted the continued operation of the defective winch. In the indemnity action, this court attempted to assay the relative degrees of culpability of the vessel owner and stevedore for their joint breaches of duty. It awarded indemnity to the shipowner upon the grounds the stevedore had the last clear chance to have avoided the injury by ordering the winch not to be worked until repaired. This decision was before the United States Supreme Court decision in the *Halcyon* case, and *Halcyon* has established the invalidity of the theory of recovery it promulgated, and over-ruled it. *American President Lines v. Marine Terminals Corp., supra*; *Union Sulphur & Oil Corp. v. Jones and Son, supra*.

The remaining cases cited in appellant's brief are correct statements of the rule of law that the shipowner is not entitled to claim indemnity where his negligent conduct combines with that of the stevedore in causing

an injury, but only in those cases where the shipowner's breach of its duty to furnish a seaworthy ship was a technical breach, or an instance of liability without fault upon the part of the shipowner.

CONCLUSION

Based upon *Halcyon*, and the prior cases from this circuit, the *Union Sulphur and Oil* and *States Steamship Company* cases, the decree of the lower court denying appellant indemnity was correct, and we respectfully submit should be affirmed.

The rule of law pronounced by these cases effects a sound and useful social policy. It will serve to make the shipowner more vigilant to prevent stevedore accidents due to unseaworthiness or defective ship's gear. By his control of the vessel, the shipowner can eliminate unsafe and defective conditions. The stevedore takes the ship and gear as he finds it. His work upon the ship is brief with little or no opportunities for inspection. The shipowner should not be rewarded for being in "pari delicto" with the stevedore.

Respectfully submitted,

BOGLE, BOGLE & GATES,
EDWARD S. FRANKLIN,
Proctors for Appellee.

No. 15024

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GEORGE WESLEY STONE and HILDEGARDE
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TEE FARNELL,

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PAUL P. O'BRIEN, CLERK



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Central Division.**



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

Attorney for Appellant:

LEO SHAPIRO,
215 South La Cienega Boulevard,
Beverly Hills, California.

Attorneys for Appellee:

ALBERT LEE STEPHENS, JR.,
535 Rowan Bldg., 458 So. Spring Street,
Los Angeles 13, California.

G. V. CUTLER,
548 San Fernando Blvd.,
Burbank, California.



In the United States District Court for the Southern
District of California, Central Division

No. 17831—BH

JACK W. S. FARNELL and ELISABETH PAT-
TEE FARNELL,

Plaintiff,

vs.

GEORGE WESLEY STONE, HILDEGARDE
W. STONE,

Defendants.

PETITION FOR REMOVAL OF THE ABOVE-
ENTITLED CAUSE TO THE UNITED
STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF CALIFORNIA,
CENTRAL DIVISION, FROM THE SU-
PERIOR COURT OF LOS ANGELES
COUNTY, IN THE STATE OF CALIFOR-
NIA

George Wesley Stone and Hildegard W. Stone,
petitioners herein and the defendants above named,
show:

I.

A civil action has been commenced and is now
pending in the Superior Court of Los Angeles
County, Burbank branch, in the State of California,
wherein Jack W. S. Farnell and Elisabeth Pattee
Farnell are plaintiffs and petitioners are defend-
ants, which action is designated by general number
Bur C 820 and is hereinafter sometimes referred to
as "said action No. 820."

II.

Said action No. 820 is a civil action of which the United States District Courts have original jurisdiction, in that said action is one wholly between citizens of different states and involves an amount in controversy in excess of \$3,000.00, exclusive of interest and costs. [2*]

III.

Petitioners seek removal of said action No. 820 to this court upon the ground and for the reason that this action involves a controversy which is wholly between citizens of different states, in that plaintiffs were, at the time of the commencement of said action and still are citizens of the State of California, residing at 13751 Mulholland Drive, Los Angeles 24, in said state of California, and that petitioners, the defendants in said action, were at the time of the commencement thereof and still are citizens of the state of New York, residing at 506 Bay 5th Street, Babylon, Long Island, in said state of New York, and not residents or citizens of the State of California.

IV.

A copy of the complaint and summons in said action No. 820 is attached hereto, marked Exhibit "A" and made a part hereof and incorporated herein as though fully set out at length herein.

V.

The matter in controversy in said action No. 820 at the commencement of said action and at the

*Page numbering appearing at foot of page of original Certified Transcript of Record.

present time exceeds the sum or value of \$3,000.00, exclusive of interest and costs.

VI.

Said action No. 820 was commenced on the 14th day of January, 1955, and an attempt to serve process therein on petitioners and defendants was made on January 19, 1955, by having a copy of the summons and complaint therein served personally on defendants at their residence; petitioners and defendants allege, however, that the service thereof was of no legal effect and subject to a motion to quash, which said motion to quash will be made by petitioners herein immediately upon the filing of this said petition for removal.

VII.

Petitioners herewith present a good and sufficient bond, as provided by statute, conditioned that petitioners will pay all costs [3] and disbursements incurred by reason of the removal proceedings should it be determined that the case was not removable or was improperly removed.

Wherefore, petitioners pray that the said action No. 820 may be removed from said state court into this court for trial and determination; that this court accept said bond and make and enter an order of removal of said action No. 820.

Dated: January 31, 1955.

/s/ WM. JEROME POLLACK,

Attorney for Petitioners.

Duly verified. [4]

EXHIBIT A

In the Superior Court of the State of California
in and for the County of Los Angeles

No. Bur. C 820

JACK W. S. FARNELL and ELISABETH
PATTEE FARNELL,

Plaintiffs,

vs.

GEORGE WESLEY STONE and HILDEGARDE
W. STONE,

Defendants.

Action brought in the Superior Court of the
County of Los Angeles, and Complaint filed in the
Office of the Clerk of the Superior Court of said
County.

SUMMONS

The People of the State of California Send
Greetings to: George Wesley Stone and Hilde-
garde W. Stone, Defendants.

You are directed to appear in an action brought
against you by the above-named plaintiffs in the
Superior Court of the State of California, in and
for the County of Los Angeles, and to answer the
Complaint therein within ten days after the service
on you of this Summons, if served within the County
of Los Angeles, or within thirty days if served

elsewhere, and you are notified that unless you appear and answer as above required, the plaintiffs will take judgment for any money or damages demanded in the Complaint, as arising upon contract, or will apply to the Court for any other relief demanded in the Complaint.

Given under my hand and seal of the Superior Court of the County of Los Angeles, State of California, this 14th day of January, 1955.

[Seal] HAROLD J. OSTLY,
County Clerk and Clerk of the Superior Court of
the State of California, in and for the County
of Los Angeles,

By N. E. WOODELL,
Deputy.

Appearance: "A defendant appears in an action when he answers, demurs, or gives the plaintiff written notice of his appearance, or when an attorney gives notice of appearance for him." (Sec. 1014 C.C.P.)

Answers or demurrers must be in writing, in form pursuant to rule of court, accompanied with the necessary fee and filed with the clerk. [5]

[Title of Superior Court and Cause.]

COMPLAINT

(Quiet Title)

Now Come the Above-Named Plaintiffs and for Cause of Action Against the Above-Named Defendants, Allege:

I.

That the plaintiffs are the owners in fee of the residential real property situated in the County of Los Angeles, State of California, described by street and number as 13751 Mulholland Drive, Beverly Hills, California, and more particularly described as follows, to wit:

That portion of Lot 1107 of Tract 1000 as per map recorded in Book 19, Page 33 of maps, in the office of the County Recorder of said county, described as follows:

Beginning at the Southwesterly corner of the land described in the deed to Fritz Brosch, et al., recorded July 25, 1941, as Instrument No. 106, in Book 18602, Page 274, Official Records of said county, said Southeasterly corner being a point on a curve concave Southeasterly, in the Northerly line of Mulholland Highway, 200 feet wide as established by the City Engineer of said city, having a radius of 600 feet a radial line to said point bears North 32° 00' 00" West; thence [7] Northeasterly along said curve in said Northerly line through a central angle of 18° 01' 19" a distance of 188.73 feet; thence

North 12° 27' West 93.83 feet; thence South 72° 33' West 248.24 feet to the Southwesterly line of said land of Brosch, et al.; thence South 42° 51' 01" East 123.55 feet to the point of beginning.

II.

That the defendants herein claim some right, title, interest, estate or lien in or to the above-described real property adverse to plaintiffs, which said adverse claims are without right and are null and void, and said defendants have no right, title, interest, estate or lien in or to the above-described real property or any part thereof.

By Way of Further Complaint, These Plaintiffs Allege:

I.

That plaintiffs are and at all times herein mentioned were husband and wife and now reside at 13751 Mulholland Drive, Beverly Hills, California.

II.

That at all times herein mentioned defendants were and now are husband and wife, that at the time of the sale hereinafter mentioned and described, they resided at the address herein next above given but they now reside in the State of New York.

III.

That on or about the 8th day of October, 1953, the defendants offered to sell to the plaintiffs the defendants' residential real property described by

street and number as 13751 Mulholland Drive, Beverly Hills, California, situated in the County of Los Angeles and the aforesaid state and more particularly described as set out hereinabove, and in making this offer the defendants stated, represented and alleged to plaintiffs regarding said property as follows:

1. That defendants were the owners in fee of the said residential property;

2. That the improvements thereon consisted of a main residence, a three-car carport, a furnished guest house, a cesspool and septic tank, a swimming pool, walks, driveways, landscaping and other appurtenances, [8] all of which were on the land hereinabove described and were part and parcel of defendants' residential property owned by them in fee.

3. That the said residential property was well worth the price asked by defendants, namely, the sum of \$38,000.00;

4. That defendants would sell the said property to plaintiffs for the sum of \$38,000.00 on the following terms and conditions:

(1) The total purchase price of \$38,000.00;

(2) A cash down payment of \$6,500.00;

(3) An assignment of a note in the face amount of \$5,250.00 carrying interest at the rate of 7% per annum on the unpaid balance, payable full on or before April 15, 1955, and secured by a second trust deed on the former home of the plaintiffs;

(4) The assumption of the obligation to pay and discharge a note secured by a first trust deed on the subject property, the balance of which was then the sum of \$15,083.64;

(5) A note in the sum of \$11,166.36, payable at the rate of \$85.00 or more per month until March 5, 1955, and thereafter at the rate of \$100.00 or more per month, together with 6% interest on the unpaid balance made by plaintiffs, payable to defendants, and secured by a second trust deed on the subject property hereinabove described;

(6) The defendants, as Sellers, would at their cost, furnish plaintiffs, as Buyers, a policy of title insurance in a reputable title insurance company.

IV.

That the statements and representation numbered 1, 2 and 3 in paragraph III next hereinabove made by said defendants, as aforesaid, were each and every one of them false and fraudulent at the time they were made, and were either known by said defendants to be false or fraudulent when they made them, or, in making said statements and representations, said defendants assumed to and intended to, and did, convey to the plaintiffs the impression that they had actual knowledge of the matters so stated and represented, when said defendants were, at the time, conscious that they had no such knowledge, [9] and were then informed and knew of the facts and circumstances sufficient to

cause them to suspect the falsity thereof, which facts and circumstances were unknown to the plaintiffs and which said defendants suppressed and concealed from said plaintiffs; and that said statements and representation were made by said defendants with the intent that plaintiffs should act in reliance thereon.

V.

That the plaintiffs did entirely, completely and implicitly believe and rely upon each of said representations and statements so made by said defendants without the means of knowing their falsity; that plaintiffs were entitled to rely upon said representations and statements and solely and only by reason of such belief and reliance on the part of plaintiffs on each and every of said statements and representations made, plaintiffs did accept defendants offer set out in paragraph III hereinabove and did purchase such residential real property from defendants.

VI.

That on the 2nd day of December, 1953, a sale escrow was opened at the West Hollywood Branch of the Bank of America N. T. & S. A. for the consummation of the sale of said property by defendants and the purchase thereof by plaintiffs. That a true and exact copy of the escrow instructions and of the closing statement thereof are marked respectively Exhibit "A" and Exhibit "B," attached hereto and made a part hereof.

VII.

That through said escrow, title to the said property passed to plaintiffs on the 22nd day of December, 1953, and the said sales escrow closed on or about the 30th day of December, 1953, plaintiffs having gone into occupation of and having taken possession of said residential property on or about the 8th day of December, 1953.

VIII.

That thereafter, plaintiffs employed an architect to make plans for additions to the main residence on said property and in the course thereof employed D. P. Jones, a licensed land surveyor of the firm of Pafford, Jones & [10] White, Hollywood, California, to make a survey of the property. This survey was completed on August 11, 1954.

IX.

That the said survey disclosed and plaintiffs for the first time learned that the boundary line of the property hereinabove described and sold by defendants and purchased by plaintiffs, ran through the main residence, and north of the guest house, leaving one-third of the main residence, all of the three-car carport, all of the furnished guest house, all of the cesspool and septic tank and portions of the walks and driveways and of the landscaping and other appurtenances, entirely off plaintiffs' property and on Mulholland Drive, property belonging to the City of Los Angeles.

X.

That defendants at the time of the sale hereinabove mentioned, knew the facts set out in paragraph IX next hereinabove, and they falsely and fraudulently represented to plaintiffs that all of said improvements were on their land and that in said sale defendants transferred good and valid title thereto to plaintiffs. That in truth and in fact, defendants did not own and in said sale did not and could not transfer to plaintiffs title to the land on which stood and was located the said improvements hereinabove mentioned to wit: The South one-third of the main residence, all of the three-car carport, all of the furnished guest house, all of the cesspool and septic tank and portions of the walks and driveways and of the landscapes and other appurtenances.

XI.

That defendants falsely and fraudulently represented to plaintiffs that their residential property being sold by defendants to plaintiffs was well worth the purchase price of \$38,000.00; that in truth and in fact the said residential property was not worth more than \$18,000.00.

XII.

That had plaintiffs known the falsity of defendants' representations as set out and specified hereinabove, they would not have purchased the said property. [11]

For a Further, Separate and Distinct Cause of Action, Plaintiffs Allege as Follows:

I.

Plaintiffs refer to paragraphs I to XI, inclusive, in this complaint next hereinabove set forth and by said reference incorporate and replead said paragraphs herein with the same force and effect as if repeated hereat verbatim.

II.

That had said real property been as represented by defendants it would have been worth the sum of \$38,000.00, but in truth and in fact it was reasonably worth only the sum of \$18,000.00 and no more.

III.

That as a direct and proximate result of defendants' false and fraudulent representations as aforesaid, plaintiffs were damaged in the sum of \$20,000.00.

Wherefore, Plaintiffs pray the judgment of this court decreeing that:

1. Defendants have no right, title, interest, estate or lien in or to the said real property described hereinabove;

2. That title of plaintiffs in and to said real property be quieted as against the defendants and that the second trust deed given by plaintiffs to defendants, copy of which is marked Exhibit "C" and annexed hereto and made a part hereof, and

the note secured thereby, be cancelled, vacated and declared void, or that the record thereof be cancelled and annulled;

3. That plaintiffs be awarded judgment of damages against defendants in the amount of \$20,000.00 subject to deduction for balance due on note secured by second trust deed given by plaintiffs to defendants when the same is cancelled;

4. And for costs of court incurred herein; and

5. For such other and further relief as to the court shall seem meet, just and proper in the premises.

G. V. CUTLER,

Attorney for Plaintiffs. [12]

ESCROW INSTRUCTIONS

(REAL ESTATE TRANSACTION)

This instruction when fully signed supercedes all former escrow instructions under this number.

To: **Bank of America**

NATIONAL ASSOCIATION

Escrow No. **39-2004**Escrow Officer **Spencer****West Hollywood** Branch
West Hollywood California**December 2**, 1953

In consideration of your acting as escrow holder herein, it is agreed that you shall in no case or event be liable for forgeries or false personations in connection with these instructions, instruments of record, or those handled in this escrow.

It is further agreed that if any controversy arises between the parties hereto or with any third person, you shall not be required to determine the same or take any action in the premises, but you may await the settlement of any such controversy by final appropriate legal proceedings or otherwise as you may require, notwithstanding anything in the following instructions to the contrary, and in such event you shall not be liable for interest or damage **On or before January 2, 1954, to complete a total purchase price of \$30,000.00, I**

I shall hand you **\$6,500.00** and a **\$5,250.00**, second trust deed note payable in monthly instalments of **\$50.00**... including **7%** interest, all due **April 15, 1955**, and also a title policy or an assignment policy or an endorsement of a title policy showing a second trust deed in **Lot 10, Tract 18292, Los Angeles County Map Book 452 Pages 23, 24**, subject only to taxes, covenants, conditions, restrictions, reservations, rights, rights of way and easements of record, and a deed of trust securing **\$10,500.00** now of record, and said second trust deed assignee

shall deliver to you any notes, instruments and additional funds required from me to enable you to comply with these instructions, all of which you are authorized and instructed to use and deliver provided instruments have been filed for record entitling you to procure assurance of title in the form of a

Standard Joint Protection Title Insurance and Trust Company,

Policy of Title Insurance issued by

in its usual form, with a liability of **\$ 38,000.00**

covering property in the

as per map recorded in Book **19**, Page **33**County of **Los Angeles**
of **Maps**State of California,
Records of said County,

described as follows

That portion of Lot 1107 of Tract No. 1000, as per legal description attached hereto and made a part hereof and which legal description appears in Title Insurance and Trust Company Policy No. 3706162 as subject property therein.

showing title vested in **Jack W. S. Farnell and Elisabeth Pattes Farnell, his wife, as joint tenants,**

subject to (1) **2nd half** General and Special taxes for the fiscal year **1953 54** INCLUDING ANY SPECIAL DISTRICT TAXES, PAYMENTS FOR WHICH ARE INCLUDED THEREIN AND COLLECTED THEREWITH

(2) Assessments and Bonds, not delinquent, unpaid balance **None**

(3) Any covenants, conditions, restrictions, reservations, rights, rights of way and easements of record, or in deed to file

(4) Mortgage — Deed of Trust securing an indebtedness of **\$16,500.00** as per its terms, now of record, unpaid balance of principal **\$15,083.64**, approximately, as to which sellers and buyers will execute the usual

Bank of America Assignment and Assumption Agreement form for delivery to lender without collection, at close of escrow. Deed to vestees shall recite said assumption, and in this connection deed dated October 6, 1953, is approved for escrow.

I shall deliver to your bank **your bank** trust on **note, executed by** **Jack W. S. Farnell and Elisabeth**

Pattes Farnell, his wife,

securing their **Note for \$11,166.36**

his wife, as joint tenants,

dated **during escrow** due of straight note

at **six** per cent per annum from **date** payable **monthly**

at **Los Angeles, California**

principal and interest due and payable in instalments of **\$5.00** OR MORE each on the **first** day of

every **calendar** month, beginning **January 5, 1954**, and continuing until **March 5, 1955**, from and after which date principal and interest shall be due and payable in instalments of **\$100.00** or more, each on the 5th day of every calendar month, beginning **April 5, 1955**, and continuing until **January 5, 1964**, on which said date any principal and interest then unpaid shall be due and payable. This deed of trust shall recite as follows: "This deed of trust is given to secure a portion of the purchase price of subject property and is second, subject and junior to deed of trust now of record and to any extensions or renewals thereof."

In the event that beneficiary's statement as to deed of trust now of record show more or less than **\$15,083.64**, as a balance, then adjust the principal amount of purchase money second trust deed so that such two principal balances equal **\$26,250.00**.

Seller is to hand into escrow at seller's expense, for buyer's approval before close of escrow, a report from a state licensed pest control operator covering improvements at **13751 Mulholland Drive, Los Angeles, California**, showing said improvements to be free of visible evidence of termites, dry rot and/or fungus infestation. Your only connection herewith is that you will not close escrow unless and until buyers approve the report handed you.

The following adjustments ONLY are required in this escrow As of close of escrow: Taxes: Interest on notes referred to in 4 and 5 above; rent per statement now filed in escrow and hereby approved for escrow.

EXHIBIT 'A'

Seller has handed into escrow a bill of sale as to furniture, etc. in guest house to be delivered to buyer, as it is, at close of escrow without additional consideration and without responsibility as to its form, contents or efficacy nor title or existence of any personal property.

Unless otherwise provided make all adjustments on basis of 30-day month, based on latest available figures in case of Taxes and Assessments or Bonds, principal and interest on encumbrances of record based on statements by Mortgagees or holders of notes for collection, interest on new encumbrances by endorsement on notes, and rents on basis of statement approved by me. Assume that insurance premiums are paid and transfer on behalf of parties hereto any fire insurance policies as handed you. Forward such policies, upon close of escrow, to agent with the request that insurer consent to such transfer or attach Loss Payable or Mortgagee's Clause or other additions or corrections, and that agent thereafter forward such policies to parties entitled thereto. **Signature of either buyer on any further instructions or approvals shall bind both.**

The expression "close of escrow" if written in these instructions shall mean the date instruments are filed for record or registration.

You are to cause no examination or report to be made on state, county or city taxes, either real or personal, or state corporation taxes for the year stated in paragraph (1) above prior to date first instalment payments are due and payable, and you are to order no special tax report except as herein otherwise specifically instructed.

It is understood that all disbursements shall be made to parties in interest, by your remittance and that remittance and instruments will be mailed to one of the parties entitled thereto, if more than one, to address given below. Instruct County Recorder to mail instruments in the same manner.

AS A MEMORANDUM BETWEEN PARTIES: Sellers agree to vacate possession at close of escrow. Deliver Title Policy to beneficiary of first trust deed.

Prepare **note & trust deed** from **Jack W.S. Farnell and Elisabeth Pardee Farnell, his wife,** your **buyer's** escrow fee and I will pay, on demand, regardless of the consummation of this escrow, all charges incurred by you for me, including fee for preparing instruments I execute, fee for recording **deed and trust deed** and your **escrow fee** and

AS A MEMORANDUM BETWEEN SELLERS AND BUYERS AND ESCROW HOLDER HAS NO CONCERN WHATEVER HERewith: (1) Seller warrants that the guest house will be leased under a written lease for a firm term of 1 year at a rental of \$175.00 per month starting December 1, 1953 and continuing until 12-1-54; Seller warrants that said guest house may be leased without violating any law, ordinance or regulation of any competent public authority, and in the event the tenant vacates the premises at any time during the 12 month following expiration of the one year lease, buyers are permitted by sellers to pay interest only, on the second trust deed obligation for as many months as during said 12 months the guest house shall remain tenanted. If you are handed any purported leases you will forward one each to parties thereof without collection and without responsibility. (2) Seller will leave wall to wall carpeting and all appliances wherever they now are. (3) Seller warrants all furniture and furnishings to be free and clear of all encumbrances.

and prior to the recording of any instrument provided for herein **Memorandum 4: Seller agrees to return to buyers any note and trust deed executed by buyers themselves prior to maturity in exchange for a note and trust deed on said Lot 10, Tract 18292, executed by any purported buyer of said property and to request reconveyance as to first mentioned 2nd trust deed. THIS MEMORANDUM refers to note secured by Trust Deeds As to Lot 10, Tract 18292, LA County Map Book 452, Page 23, 24.**

**Elisabeth Pardee Farnell HO26506
1026 N. Sweetser, Los Angeles**

The foregoing instructions and conditions are hereby approved and accepted in their contents and understood in by me. I will supply you with funds, notes and instruments required from me to enable you to comply with the instructions which you are authorized to use and deliver provided you hold for my account any instruments accruing to me and the sum of \$ **6,500.00,**

Order search of title at once. Deduct all my expenses from funds accruing to me. I will pay, on demand, regardless of the consummation of this escrow, all charges incurred by you for me (except those other party has agreed to pay) including title charge, fee for preparing instruments I execute, your **seller** escrow fee and

Prepare **(deed is prepared)** from
Attach Internal Revenue Stamps in the amount of \$ _____ to Deed I execute
Pay Commission of \$ _____ to
License No _____

Make following disposition of proceeds due me

1 Credit Com'l account of _____ at _____ Branch

2 Mail Check to me at **20-43-207th St., Queens Village 28, Long Island, New York.**

Signature on any further instructions or approvals by either seller shall bind both. Obtain beneficiary's statement from your Clauson and Avalon Branch for use in escrow. If title company cannot find first half taxes paid, hold sum sufficient to cover such 1st. half taxes until title company reports the payment.

Signature **Hildegard W. Stone**

Address _____

Telephone _____

Signature **George Wesley Stone, Address above**
or **13751 Mulholland Drive, Los Angeles,**

Address **Cal ST 45929**

Telephone _____

[illegible]

Bank of America

NATIONAL EXCHANGERS ASSOCIATION

West Hollywood

Branch

Date 12-30-53

ESCROW STATEMENT

Escrow of Farnell: Jack W. S. and Elisabeth Patee

Escrow No. 39-2004

Per. Lot 1107, Tr. 1000....

ITEMS	DEBITS	CREDITS
By or for you		6,709 50
Registration: Sale	33,000 00	
Loan		
Costs of Escrow		
State of Mortgage or Trust Deed of Record		15,083 64
Assigned trust deed and note (Lot 10, Tract 13292)		5,250 00
Trust Money Trust Deed		11,166 36
Payments or Bonds		
Adjustment @ \$59.00 per 1/2 yr., 12-22-53 to 7-1-54	61 95	
Advance Pro Rata @ \$37.50 per 3 yrs., 12-22-53 to 12-2-54	43 25	
Adjustment @ \$175.00 per month, 12-22-53 to 1-1-54		52 49
Interest Adjustment @ 5%, 11-1-53 to 12-22-53		106 83
F.A. Loan Trust Funds		
California Mutual Mtg. Ins.		
Trust Mtg. or Trust Deed. December 1, payment	175 00	
at \$.....@.....% from.....to.....		
Trust Mtg. or Trust Deed		
at \$.....@.....% from.....to.....		
Commission		
Assurance of Title. Assignment of trust deed endorsement	10 00	
State Revenue Stamps		
Municipal Lien Report - Tax Service Contract		
Recording Fee		
Recording. deed, trust deed, assignment, release and release endorsement (for title company)	8 90	
Insurance Endorsements		
Copy Fees		
For Preparing Documents	2 50	
Ar's Service Fee		
Now Fee	22 50	
Balance Due	44 69	
Check to Balance		
TOTALS	30,360 02	30,360 82

RETAIN FOR TAX PURPOSES

EXHIBIT "B"

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the
or

Between **Jack W. S. Farnell and Elisabeth Patee Farnell, his wife**

County of Los Angeles, State of California

George Wesley Stone and Hildegarda W. Stone, his wife, as joint tenants

Witnesseth: That Trustor irrevocably GRANTS, TRANSFERS AND ASSIGNS to TRUSTEE IN TRUST, WITH POWER OF SALE, that property in **Los Angeles** County, California, described as:

That portion of Lot 1107 of Tract No. 1000, as per map recorded in Book 19, Page 33 of Maps, in the office of the County Recorder of said county, described as follows:

Beginning at the Southwesterly corner of the land described in the deed to Frita Brooch et al, recorded July 23, 1941, as Instrument No. 106, in Book 18602, Page 274, Official Records of said county, said Southeasterly corner being a point on a curve concave Southeasterly, in the Northernly line of Mulholland Highway, 200 feet wide, as established by the city engineer of said city, having a radius of 600 feet, a radial line to said point bears North 12° 00' 00" West; thence Northeasterly along said curve in said Northernly line through a central angle of 18° 01' 19" a distance of 188.73 feet; thence North 12° 27' West 93.83 feet; thence South 72° 33' West 240.24 feet to the Southwesterly line of said land of Brooch et al; thence South 42° 51' 01" East 123.55 feet to the point of beginning.

This deed of trust is given to secure a portion of the purchase price of subject property and is second, subject and junior to a deed of trust now of record and to any extensions or renewals thereof.

TOGETHER WITH the rents, issues and profits thereof, SUBJECT, HOWEVER, to the right, power and authority given to and conferred upon Beneficiary by Section B, Paragraph 5, of the provisions adopted and included herein by reference to collect and apply such rents, issues and profits.

For the purpose of Securing (1) payment of the indebtedness evidenced by one promissory note of even date here with in the principal sum of \$ 11,166.36 ...payable to Beneficiary or order and (2) the performance of each agreement of Trustor adopted and included by reference or contained herein

By the execution and delivery of this Deed of Trust and the note secured hereby the parties hereto agree that there are adopted and included herein for any and all purposes by reference as though the same were written in full herein the provisions of Section A, including paragraphs 1 through 5 thereof, and of Section B, including paragraphs 1 through 9 thereof, of that certain fictitious Deed of Trust recorded in the official records in the office of the County Recorder of Sacramento County on April 18, 1950, in book 1814 at page 186 and in the official records in the office of the County Recorder of Shasta County on April 18, 1950, in book 327 at page 1, and in the official records in the offices of the County Recorders of the following counties on April 17, 1950, in the books and at the pages designated after the name of each county:

COUNTY			COUNTY			COUNTY			COUNTY		
BOOK	PAGE	COUNTY	BOOK	PAGE	COUNTY	BOOK	PAGE	COUNTY	BOOK	PAGE	COUNTY
Alameda	6080	519	Alameda	1610	347	Alameda	149	199	Santa Cruz	767	498
Alpine	F	71	Kings	454	10	Orange	1999	492	Sierra	1	202
Amador	F	72	Lake	206	49	Placer	566	647	Siskiyou	257	334
Bute	544	145	Lassen	60	146	Plumas	31	94	Solano	527	21
Calaveras	60	309	Los Angeles	328	74	Riverside	1164	336	Sonoma	953	186
Colusa	166	2	Madera	491	62	San Benito	169	406	S Stanislaus	1000	1
Contra Costa	1539	32	Marin	647	154	San Bernardino	2562	143	Sutter	321	30
Del Norte	31	475	Mariposa	31	396	San Diego	3584	000	Tehama	120	308
El Dorado	275	485	Merced	267	51	San Francisco	54	23	Tehama	40	420
Fresno	2815	75	Modoc	981	44	San Joaquin	1240	432	Tulare	1437	411
Glenn	244	415	Monterey	82	141	San Luis Obispo	560	504	Tuolumne	47	119
Humboldt	127	242	Mono	27	81	San Mateo	1818	193	Ventura	926	307
Imperial	777	126	Monterey	120	132	Santa Barbara	911	491	Yolo	521	95
Inyo	81	1	Napa	331	100	Santa Clara	1962	33	Yuba	140	213

A copy of said provisions so adopted and included herein by reference is set forth on the reverse hereof.

A copy of said provisions so adapted and included herein by reference is set forth on the reverse hereof. The undersigned Trustor requests that a copy of any notice of default and of any notice of sale hereunder be mailed to him at his address given above.

Signature of Trustor _____

Jack W. S. Farnell

Elisabeth Pattee Farnell

STATE OF CALIFORNIA
COUNTY OF **Los Angeles**

SPACE BELOW FOR RECORDER'S USE ONLY

On this 14 day of December 1953
before me, the undersigned

Public in and for said County, personally appeared **Jack W. S. Farnell and Elizabeth Pattee Farnell**

EXHIBIT "C"

known to me to be the person(s) whose name(s) **are** subscribed
to the within instrument, and acknowledged that **they** executed

WITNESS my hand and official seal

(SEAL) **R. P. Spencer (u)**
R. P. Spencer

L. P. Spencer
Notary Public in and for said County, and State

My Commission Expires **December 7, 1956.**
(If executed by a corporation the corporation form of acknowledgment must be used)

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14

G. V. CUTLER

Attorney for. **Plaintiff**

133 North Third St.

Burbank, California

Address

Telephone: IM 64911 TH 65077

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF LOS ANGELES

JACK W. S. FARNELL ET UX

Plaintiff,

vs. STONE

GEORGE WESLEY STONE ET UX

Defendant.

No. BUR C

CERTIFICATE FOR
ASSIGNMENT AND TRANSFER

This is to certify that the above entitled action is entitled to be transferred to the

Burbank A

Department of the Superior Court of Los Angeles County,

as provided in Subdivision M, Rule 18 of this Court, for the following reason:

Convenience of parties and witnesses.

SO ORDERED:

G. V. Cutler

Judge

Attorney for **Plaintiffs**

STATE OF CALIFORNIA, }
County of Los Angeles, } ss.
Jack W. S. Farnell

, being first duly sworn, on oath, says:

That **he** is the plaintiff in the above entitled action;

that **he** has read the foregoing certificate and knows the contents thereof; and that the same is true of **his** own knowledge.

Subscribed and sworn to before me this

Jack W. S. Farnell

14 day of January, 1955.

G. V. Cutler
Notary Public (SEAL)

Endorsed : Filed February 2, 1955.

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In the United States District Court for the
Southern District of California, Central Division
No. 17831-BH

JACK W. S. FARNELL, et al.,

Plaintiffs,

vs.

GEORGE WESLEY STONE, et al.,

Defendants.

AFFIDAVIT OF GIVING NOTICE, FILING
COPY OF PETITION FOR REMOVAL

State of California,
County of Los Angeles—ss.

Wm. Jerome Pollack, being first duly sworn according to law deposes and says as follows: That subsequent to the filing of the Petition for Removal and the bond herein, affiant gave written notice of the filing of said bond and petition to all adverse parties and filed a copy of the said petition with the Clerk of the Superior Court of Los Angeles County, in duplicate.

/s/ WM. JEROME POLLACK.

Subscribed and sworn to before me this 3rd day of February, 1955.

[Seal] /s/ SYDELL WOLFE,

Notary Public in and for
Said County and State.

[Endorsed]: Filed February 3, 1955. [19]

[Title of District Court and Cause.]

NOTICE OF REMOVAL

To Plaintiffs, Jack W. S. Farnell and Elisabeth Pattee Farnell and to G. V. Cutler, Their Attorney:

You and Each of You Will Please Take Notice That Defendants have filed a petition for removal to the above-entitled United States District Court of the above-entitled action, pursuant to Title 28, Sections 1441-1450, inclusive, of United States Code and have filed a bond as required by Section 1446(a) of said Title and

You Are Hereby Given Notice of the filing of said petition on February 2, 1955, and bond and a copy of said petition is attached herewith.

Dated: February 2, 1955.

/s/ WM. JEROME POLLACK,
Attorney for Defendants.

Affidavit of service by mail attached.

[Endorsed]: Filed February 3, 1955. [20]

In the United States District Court for the
Southern District of California, Central Division
No. 17831-BH

JACK W. S. FARNELL, ELISABETH PATTEE
FARNELL,

Plaintiffs,

vs.

GEORGE WESLEY STONE, HILDEGARDE
W. STONE,

Defendants,

BANK OF AMERICA, a Corporation,

Additional Defendant on Counterclaim.

ANSWER AND COUNTERCLAIM

Come now the defendants George Wesley Stone and Hildegard W. Stone and in answer to plaintiffs' complaint on file herein admit, deny and allege as follows:

Answer to First Cause of Action

I.

In answer to Paragraph II, defendants deny that their said claim or claims, adverse or otherwise, is or are without right or null or void; defendants deny that they have no right or title or interest or estate or lien in or to the real property described in said complaint. Defendants allege that they are the beneficiaries of a trust deed which is a valid

and subsisting lien on said real property, which said trust deed covers the real property described in Paragraph I of plaintiffs' first cause of action, is dated December [32] 3, 1953, executed by Jack W. S. Farnell and Elisabeth Pattee Farnell, trustors, in favor of George Wesley Stone and Hildegard W. Stone as beneficiaries, with the Bank of America as trustee; said trust deed was recorded on December 22, 1953, in Book 13450, page 271, of Official Records of Los Angeles County, California.

Answer to Second Cause of Action

I.

Defendants deny generally and specifically each and every, all and singular, the allegations contained in Paragraph IV.

II.

In answer to Paragraph V, defendants admit that plaintiffs accepted said offer and purchased said real property from defendants. Except as expressly admitted, defendants deny generally and specifically each and every, all and singular, the allegations contained in said Paragraph V.

III.

In answer to Paragraph X, defendants deny that at the time of sale or at any time prior thereto or at any other time they knew the facts set out in Paragraph IX; defendants deny that they falsely or fraudulently represented to plaintiffs, or either of them, that all of said improvements were on their

land; defendants deny that they falsely or fraudulently represented to plaintiffs, or either of them, that in said sale they transferred good or valid title thereto to plaintiffs, or either of them.

IV.

Deny generally and specifically each and every, all and singular, the allegations contained in Paragraph XI.

V.

Deny generally and specifically each and every, all and singular, the allegations contained in Paragraph XII.

Answer to Third Cause of Action

I.

In answer to Paragraph I, defendants refer to Paragraphs I, II, III, IV and V of their answer to second cause of action, incorporate them herein and make them a part hereof as though fully set out at length herein.

II.

Deny generally and specifically each and every, all and singular, the allegations contained in Paragraph II.

III.

Deny generally and specifically each and every, all and singular, the allegations contained in Paragraph III.

For a Counterclaim, Defendants Allege:**I.**

Plaintiffs Jack W. S. Farnell and Elisabeth Pattee Farnell are husband and wife.

II.

That defendant Bank of America, a corporation, is a corporation organized and existing under and by virtue of the laws of the State of California; that said defendant is trustee named in the trust deed hereafter referred to and is made an additional party hereto on the counterclaim for the purpose of having all parties interested before the Court.

III.

On December 3, 1953, plaintiffs Jack W. S. Farnell and Elisabeth Pattee Farnell made, executed and delivered to defendants George Wesley Stone and Hildegard W. Stone their certain promissory note in writing in the sum of \$11,166.36, payable with six per cent interest per annum at the rate of \$85.00 per month, commencing January 5, 1954, until March 5, 1955, after which said monthly payments were to be in the sum of \$100.00 per month. A photostatic copy of said note is attached hereto, marked Exhibit "A" and made a part hereof. [34]

V.

As security for said promissory note, and as part of the same transaction, plaintiffs Jack W. S. Farnell and Elisabeth Pattee Farnell executed and delivered to defendants George Wesley Stone and

Hildegarde W. Stone a trust deed upon the following described real property situated in Los Angeles County, California:

That portion of Lot 1107 of Tract No. 1000, as per map recorded in Book 19, Page 33 of Maps, in the office of the County Recorder of said County, described as follows: Beginning at the Southwesterly corner of the land described in the deed to Fritz Brosch, et al., recorded July 25, 1941, as Instrument No. 106, in Book 18602, Page 274, Official Records of said County, said Southeasterly corner being a point on a curve concave Southeasterly, in the Northerly line of Mulholland Highway, 200 feet wide, as established by the city engineer of said city, having a radius of 600 feet, a radio line to said point bears North 32° 00' 00" West; thence Northeasterly along said curve in said Northerly line through a central angle of 18° 01' 19" a distance of 188.73 feet; thence North 12° 27' West 93.83 feet; thence South 72° 33' West 248.24 feet to the Southwesterly line of said land of Brosch, et al.; thence South 42° 51' 01" East 123.55 feet to the point of beginning.

Said trust deed was duly recorded on December 22, 1953, in book 13450, page 271 of Official Records in the office of the County Recorder of said Los Angeles County. A copy of said trust deed is attached hereto, marked Exhibit "B" and made a part hereof.

V.

The trust deed sued on herein is being foreclosed as a mortgage. [35]

VI.

Defendants George Wesley Stone and Hildegarde W. Stone are the legal holders and owners of said note and trust deed.

VII.

Default has been made under the terms of said note and trust deed in that the aggregate of the monthly payments of principal and interest which had matured and become due under the terms thereof as of February 5, 1955, is \$1190.00, no part of which has been paid except \$595.00. Defendants George Wesley Stone and Hildegarde W. Stone have exercised their option by reason of said default and have declared the entire remaining balance of said note to be due, together with interest on said sum from August 5, 1954, at the rate of six per cent per annum.

VIII.

By the terms of said note and trust deed plaintiffs agreed to pay attorney's fees in a reasonable amount to be fixed by the Court and all costs and expenses in any action brought to foreclose this trust deed or in any action on said note. Defendants George Wesley Stone and Hildegarde W. Stone have employed an attorney, Wm. Jerome Pollack, to institute an action on said note and foreclose said trust deed and there is now due to said attorney for and on account of attorney's fees, a reasonable attorney's fee in such amount as may be fixed by the Court.

Wherefore, defendants George Wesley Stone and Hildegard Stone pray that:

1. Plaintiffs take nothing by their complaint on file herein;

2. The Court orders Bank of America, a corporation, to be made a party defendant to respond to the counterclaim herein;

3. Defendants George Wesley Stone and Hildegard W. Stone have judgment on their counterclaim against plaintiffs and Bank of America as follows: [36]

a. Defendants George Wesley Stone and Hildegard W. Stone recover from plaintiffs the sum of \$10,959.09 principal, together with interest thereon at the rate of six per cent per annum from August 5, 1954, plus reasonable attorney's fees as fixed by the Court, plus costs and disbursements herein and the charges and costs of sale;

b. Plaintiffs and all persons claiming under them be foreclosed of any equity of redemption of said real property or any part thereof;

c. Said real property be adjudged to be sold en masse in the manner provided by law and the practice of this Court, by the sheriff of Los Angeles County or by the commissioner appointed for that purpose, and the proceeds applied to the payment of the amount due on said note and trust deed, with interest, disbursements, costs, attorney's fees:

d. Defendants George Wesley Stone and Hildegard W. Stone may be the purchaser at said sale.

and that the sheriff or commissioner execute a certificate of sale, and upon the expiration of the period of redemption that the holder of said certificate of sale be let into possession of said premises, and that the sheriff or commissioner issue a deed to said purchaser;

e. If the proceeds of such sale be insufficient to pay the amount so due to said defendants George Wesley Stone and Hildegard W. Stone, as aforesaid, and it shall so appear from the return of sale, judgment for such deficiency be thereupon entered against plaintiffs;

4. For costs of suit incurred herein;

5. For such other and further relief as to the Court may seem proper.

/s/ WM. JEROME POLLACK,
Attorney for Defendants. [37]

EXHIBIT A

Deed of Trust Instalment Note—Interest Included

Do not destroy this note: When paid, this note, with Deed of Trust securing same, must be surrendered to Trustee for cancellation and retention, before reconveyance will be made.

\$11,166.36. Los Angeles, Calif., Dec. 3, 1953

In instalments as herein stated, for value received, I promise to pay to George Wesley Stone and Hildegard W. Stone, his wife, as joint tenants,

or order, at Los Angeles, California the sum of Eleven Thousand, One Hundred, Sixty-Six and 36/100 Dollars, with interest from date on unpaid principal at the rate of six per cent per annum; principal and interest payable in instalments of Eighty-five and no/100 Dollars or more on the 5th day of each calendar month, beginning on the 5th day of January, 1954, and continuing until March 5, 1955, from and after which date principal and interest shall be due and payable in installments of \$100.00, or more, each on the 5th day of every calendar month beginning April 5, 1955, and continuing until January 5, 1964, on which said date any principal and interest then unpaid shall be due and payable. Each payment shall be credited first on interest then due and the remainder on principal; and interest shall thereupon cease upon the principal so credited. Should default be made in payment of any instalment when due the whole sum of principal and interest shall become immediately due at the option of the holder of this note. Principal and interest payable in lawful money of the United States. If action be instituted on this note I promise to pay such sum as the Court may fix as attorney fees. This note is secured by a Deed of Trust of even date herewith to Bank of America National Trust and Savings Association, a National Banking Association.

/s/ JACK W. S. FARNELL,

/s/ ELISABETH PATTEE
FARNELL. [38]

adopting and including by reference certain provisions of a deed of trust recorded in the counties named herein.
A copy of said provisions is set forth on the reverse hereof.

This Deed of Trust, made this 3rd day of December, 1953

Between Jack W. S. Farnell and Elisabeth Pattee Farnell, his wife,

of 13751 Mulholland Drive in the City of Los Angeles

County of Los Angeles

State of California

herein called TRUSTOR, Bank of America a national banking association herein called TRUSTEE, and

George Wesley Stone and Hildegard W. Stone, his wife, as joint tenants

herein called BENEFICIARY,
Witnesseth: That Trustor irrevocably GRANTS, TRANSFERS AND ASSIGNS TO TRUSTEE IN TRUST WITH
POWER OF SALE, that property in Los Angeles
County, California described as:

portion of Lot 1107 of Tract No. 1000, as per as recorded in Book 19, Page 33
maps, in the office of the County Recorder of said County, described as follows:

beginning at the Southwesterly corner of the land described in the deed to Fritz
Sch et al, recorded July 25, 1941, as Instrument No. 106, in Book 18602, Page 274,
Official Records of said County, said Southeasterly corner being a point on a curve
curve Southeasterly, in the Northerly line of Mulholland Highway, 200 feet wide,
established by the city engineer of said city, having a radius of 600 feet, a
radial line to said point bears North 32° 00' 00" West; thence Northeasterly along
curve in said Northerly line through a central angle of 13° 01' 19" a distance
86.73 feet; thence North 12° 47' 00" East 93.83 feet; thence South 72° 33' 00" East 245.24
feet to the Southwesterly line of said land of Brosch et al; thence South 42° 51' 01"
123.55 feet to the point of beginning.

Deed of trust is given to secure a portion of the purchase price of subject property
is second subject and junior to a deed of trust now of record and to any extensions
thereof.

TRUSTEE HEREBY warrants and promises that SUBJECT HOWEVER, the right, power and authority given
and conferred upon Beneficiary by Section B, Paragraph 1 of the deed of trust is included herein by reference to
collect and apply such rents, issue and profits.

For the purpose of Securing a copy of the indebtedness evidenced by the promissory note of even date here
with for the principal sum of \$11,166.36 payable to Beneficiary, and for the enforcement of each agreement
of Trustor adopted and included by reference is contained herein.

By the execution and delivery of this Deed of Trust and the foregoing recited by the parties hereto agree that
there is no dispute as to the validity of the indebtedness evidenced by the promissory note of even date here
with, and that the parties hereto agree that the provisions of Section A, including Paragraph 1 of the deed of trust, through 9 thereof,
of this certain Deed of Trust, recorded in the Official Records in the office of the County Recorder of Sacramento County
on April 18, 1910, in Book 18 4 at page 32, and in the Official Records in the office of the County Recorder of Santa Clara County
on April 18, 1910, in Book 32 at page 1, and in the Official Records in the office of the County Recorder of the following counties
on April 17, 1910, in the books and in the pages designated after the name of each county:

COUNTY	BOOK	PAGE	COUNTY	BOOK	PAGE	COUNTY	BOOK	PAGE
Alameda	6040	319	Kern	1634	147	Nevada	149	109
Alpine	42	71	Kings	454	10	Orange	1699	492
Amador	42	76	Lake	206	449	Placer	566	647
Butte	544	145	Lassen	60	146	Plumas	31	94
Calaveras	60	109	Los Angeles	12874	131	Riverside	1164	116
Columbia	166	2	Madera	491	62	San Benito	169	406
Contra Costa	1519	32	Marin	647	154	San Bernardino	2562	141
Del Norte	11	475	Mariposa	31	946	San Diego	1584	100
El Dorado	275	485	Mendocino	267	51	San Francisco	5423	490
Fresno	2815	75	Merced	981	44	San Joaquin	1240	432
Glenn	244	415	Mudor	82	941	San Luis Obispo	560	594
Humboldt	127	442	Nimrod	27	81	San Mateo	1818	191
Imperial	777	126	Monterey	1210	192	Santa Barbara	911	491
Inyo	81	1	Napa	331	100	Santa Clara	1962	14

A copy of said provisions is adopted and included herein by reference is set forth on the reverse hereof.
The undersigned Trustor requests that a copy of any notice, default and any notice of sale hereunder be mailed to him at his
address given above.

Signature of Trustor

Jack W. S. Farnell
Elisabeth Pattee Farnell

STATE OF CALIFORNIA
COUNTY OF Los Angeles

SPACE BELOW FOR RECORDER'S USE ONLY
Entered as Trust Deed and Assignment of Rents

On this 14 day of December, 1953
before me, the undersigned, a Notary
Public in and for said County, personally appeared Jack W. S.
Farnell and Elisabeth Pattee Farnell

known to me to be the person(s) whose name(s) are subscribed
to the within instrument, and acknowledged that they executed
the same.

WITNESS my hand and official seal
(SEAL) *[Signature]*
Notary Public in and for said County and State

My Commission Expires December 7, 1956
(I am governed by a corporation the corporation form of acknowledgment
must be used.)

COMMITMENT No. 540
RECORDED AT REQUEST OF
TITLE INSURANCE & TRUST CO

DEC 22 1953 AT 8 A M
BOOK 13450 PAGE 271
IN OFFICIAL RECORDS
County of Los Angeles, California

Page 331
MAINE B. BEATTY, County Recorder
By *[Signature]* Deputy

Endorsed: Filed February 23, 1955.

Exhibit B

39

[illegible]

Need for Trust
SECRET ARMY

1

[Title of District Court and Cause.]

ANSWER TO COUNTERCLAIM

Come now the plaintiffs herein, and answering the Counterclaim on file herein admit, allege, and deny as follows:

I.

Answering Paragraphs V and VI of defendants' Counterclaim, these answering plaintiffs state that they have no information or belief on the matters and things therein mentioned and alleged sufficient to enable them to answer the same, and on that ground deny generally and specifically each and every allegation in said paragraphs contained and the whole thereof.

II.

Answering paragraphs VII and VIII of the Counterclaim, these [50] answering plaintiffs admit that they have not continued payment on the said note and in justification of their action in discontinuing the payments on said note from and after the 5th day of February, 1955, as in said Counterclaim alleged, plaintiffs refer to their Second Cause of Action set out in the Complaint, beginning with Paragraph I thereof on page 2 of the Complaint, to and including Paragraph XII thereof on page 5, and by this reference incorporates herein said paragraphs and their allegations with the same force and effect as if set out hereat verbatim.

Wherefore, these answering plaintiffs pray that the said note and the Trust Deed set out in and at-

tempted to be foreclosed as a mortgage by and in the Counterclaim, be declared by this Court to be cancelled and to be null and void on the grounds that they were procured by the fraud of the plaintiffs and on the ground of substantial failure of consideration from defendants to plaintiffs and plaintiffs pray that defendants take nothing thereby, and that plaintiffs have and be awarded by this Court the relief prayed for in the Complaint on file herein.

/s/ G. V. CUTLER,

Attorney for Plaintiffs.

Duly verified.

Affidavit of service by mail attached.

[Endorsed]: Filed August 4, 1955. [51]

[Title of District Court and Cause.]

MINUTES OF THE COURT
AUGUST 9, 1955

Present: Hon. Ben Harrison, District Judge.

Proceedings:

For jury trial. At 10:12 a.m. Court convenes herein. Both sides answer ready and It Is Ordered that trial proceed.

Counsel for plaintiffs offers certain documents in evidence, and on stipulation of counsel for defendants, same are ordered admitted in evidence, and same are marked Plfs' Ex. 1.

Anton H. Deutsch is called by plaintiffs, sworn, and testifies, and Plfs' Ex. 2 is admitted into evidence and marked.

Don P. Jones is called by plaintiffs, sworn, and testifies, and Plfs' Ex. 3 is admitted into evidence and marked.

Counsel for defendants and counsel for plaintiffs orally stipulate that this cause may proceed as a non-jury case, and that a jury is waived at this time.

Said witness Don P. Jones testifies further.

P. D. Baehr is called by plaintiffs, sworn, and testifies, and Plfs' Ex. 4 is admitted into evidence on stipulation of counsel for defendants.

Harry Bernasconi is called by plaintiffs, sworn, and testifies.

At 11:15 a.m. Court recesses to 11:21 a.m., when Court reconvenes herein, appearances being as before.

Anton H. Deutsch, heretofore sworn, is recalled and testifies further.

Bruce D. Wilfong, Frank Queen Peters, and Jack W. S. Farnell, one of the plaintiffs, are, respectively, called, sworn, and testify for plaintiffs.

At 11:53 a.m. Court recesses until 2 p.m. today.

At 2:15 p.m. Court reconvenes herein, and all being present as before, Court orders trial proceed.

Jack W. S. Farnell, one of the plaintiffs, heretofore sworn, resumes the stand and testifies further.

Elisabeth Pattee Farnell, one of the plaintiffs, is called, sworn, and testifies. Plaintiffs rest:

Attorney Pollack on behalf of defendants Stone moves that the complaint of plaintiffs be dismissed and for judgment in favor of Defendants Stone, and states the grounds of the motion to the Court.

The Court Orders said motion on behalf of Defendants Stone denied.

George Wesley Stone, one of the defendants, is called, sworn, and testifies. At 2:40 p.m. Court recesses to 2:45 p.m., at which time Court reconvenes herein, and all being present as before, Court Orders trial proceed.

Hildegarde W. Stone, one of the defendants, is called, sworn, and testifies. Plfs' Ex. 5 is admitted in evidence and marked.

Jack W. S. Farnell, defendant, heretofore sworn, is recalled by defendants Stone under Rule 43(b) and testifies further.

Counsel for the parties hereto have a discussion relative to a certain plat, and that if said plat is found and produced, counsel may stipulate to the same being admitted into evidence herein.

The Court makes a statement to counsel that they will be given time to brief the questions of law.

The Court makes a further statement to counsel and to the parties hereto.

It Is Ordered that upon the filing of briefs of counsel 20x20x20, this cause is to stand Submitted for decision.

On motion of counsel for Defendants Stone It Is Ordered that the Bank of America, a corporation, be, and it is Dismissed as an additional defendant on the counterclaim of Defendants Stone.

The Court and counsel have a further discussion.
At 3:25 p.m. Court adjourns.

JOHN A. CHILDRESS,
Clerk;

By /s/ MURRAY E. VIRE,
Deputy Clerk.

[Title of District Court and Cause.]

MINUTES OF THE COURT
NOVEMBER 3, 1955

Present: Hon. Ben Harrison, District Judge.

Proceedings:

This cause having been heretofore tried and submitted for decision, and the Court having duly considered the pleadings, record, evidence, briefs of counsel, and the law applicable, and being fully advised in the premises, now signs and orders filed its Memorandum Opinion, and in accordance therewith, finds and orders as follows:

From the facts presented there is definite damage to plaintiffs which the Court finds from all the evidence to be in the amount of \$15,000.

It Is Hereby Ordered that the second trust deed given by plaintiffs to defendants and the note secured thereby be cancelled and that the judgment of \$15,000 be subject to this deduction.

Judgment is also rendered against defendants on

their counterclaim for default of the second trust deed note and foreclosure of the subject property.

Counsel for plaintiffs is directed to submit proposed judgment and findings to the Court within ten days from date.

Filed Memorandum Opinion.

Mailed copies of Memorandum Opinion to respective counsel.

JOHN A. CHILDRESS,

Clerk.

By /s/ MURRAY E. VIRE,

Deputy Clerk.

[Title of District Court and Cause.]

MEMORANDUM OPINION

This is an action based on fraud to recover damages for misrepresentations with regard to a residence on 13751 Mulholland Drive, Beverly Hills, California, purchased by plaintiffs from defendants. The plaintiffs paid \$38,000 for property that was to include a main house, three car ports, a guest house, and appurtenant real property. After taking possession plaintiffs discovered through a survey of the property that the boundary of their real property did not include one-third of the main house, all the car ports, all of the guest house, and a proportionate amount of the real property.

After due consideration the Court is of the opinion that the plaintiffs have established their right to damages. Although conflicting evidence was introduced on whether there were express representations as to the boundaries [53] of the property, it is my view that representations, express as well as implied, were made entitling the plaintiffs to recovery.

The California Civil Code defines fraud as being either actual or constructive. [California Civil Code § 1571.]

Actual fraud [California Civil Code § 1572] is defined to consist among other things, of the following act(s) committed by a party to a contract, or with his connivance, with intent to deceive another party thereto, or to induce him to enter the contract:

“(2) The positive assertion in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true.”

Constructive fraud [California Civil Code § 1573] consists:

“(1) In any breach of duty which, without an actually fraudulent intent, gains an advantage to the person in fault, or anyone claiming under him, by misleading another to his prejudice, or to the prejudice of anyone claiming under him.”

The law in California is well settled that a vendor is presumed to know the area and boundaries

of his own land. [See *Harder v. Lang Realty Co.*, 214 P. 1017 (1923); *Del Grande v. Castelhun*, 205 P. 18 (1922); *Eichelberger v. Mills Land, etc., Co.*, 100 P. 117 (1908); *Shearer v. Cooper*, 134 P. 2d 764 (1943); *Hargrove v. Henderson*, 292 P. 148 (1930).] A purchaser is entitled to rely on the vendor's representations as to the boundaries and not make an independent investigation. [*Teague v. Hall*, 154 P. 851 (1916); *Peardon v. Markley*, 195 P. 70 (1920); *Eichelberger v. Mills Land, etc., Co.*, 100 P. 117 (1908).] And even though plaintiffs were supposed to have received a map showing the proper boundaries [54] of the property, it does not seem from all the evidence that they were put on notice.

Thus here it is clear that defendants have committed constructive fraud [California Civil Code §1573] breaching their duty to know the area of their land and gaining advantage of the plaintiffs. The defendants have also committed actual fraud under California Civil Code §1572 subd. 2 in that they made representations not warranted by their information. In *Shearer v. Cooper*, *supra*, at 768, the Supreme Court of California in affirming the trial court declared:

“It is fair to assume that the defendant did not know the exact location of the boundaries of the acreage which he sold to the plaintiffs; but under the law it is a matter about which he should have informed himself before making the representations. The trial court con-

cluded that the defendant's positive assertions in a manner not warranted by the information he possessed, of that which was not true, constituted actual fraud within the meaning of Subdivision 2 of §1572 of the Civil Code."

[See also *Sturnis v. Adams*, 195 P. 955 (1920); *Harris v. Miller*, 235 P. 981 (1925); *Hargrove v. Henderson*, 292 P. 148 (1930).]

The defendants concede in their brief that by their acts they have committed constructive fraud, but that this only permits a suit for rescission. The argument presented is that where there are only innocent misrepresentations an action for damages will not lie. Inherent in this argument is the admission that ordinarily where there are material misrepresentations one has two remedies, either a suit for rescission or an action for damages, but where misrepresentations are innocent there is only the single remedy of rescission. [55]

In the law of California there does not appear to be that distinction. Especially so since there can be actual fraud without the positive intent to deceive. The defendants' argument is based largely on the fact that many cases discussing fraud, either actual or constructive, are suits for rescission. The fact that a party decides to rescind a contract rather than affirm it, however, does not necessarily change the applicable law. The reason that there may be so many suits for rescission under these circumstances may perhaps be just attributed to the fact that a

party would not have acted had he known the real conditions of his purchase.

In this case there does not appear to be any problem with what is known as an election of remedies. [See 26 So. Col. L. Rev. 157 (1952), Election of Remedies for Fraudulent Misrepresentations.] The plaintiffs have always acted consistently with their decision to affirm the contract. There can be little doubt that plaintiffs can sue for damages. This same question was thoroughly discussed in *Hargrove v. Henderson*, *supra*, at 151 et seq., where it was decided affirmatively. And in *Shearer v. Cooper*, *supra*, decided by the California Supreme Court, an action for damages was permitted on facts similar to those here. [See also *Herzog v. Capital Co.*, 150 P. 2d 218 (1944), affirmed in 164 P. 2d 8 (1945); *Kaluzok v. Brisson*, 167 P. 2d 481 (1946); *Nevada Land & Investment Corp. v. Sistrunk*, 30 P. 2d 389 (1934); *Kent v. Clark*, 128 P. 2d 868 (1942).]

From the facts presented there is definite damage to plaintiffs which the Court finds from all the evidence to be in the amount of \$15,000. It is hereby ordered that the second trust deed given by plaintiffs to defendants and [56] the note secured thereby be cancelled and that the judgment of \$15,000 be subject to this deduction. Judgment is also rendered against defendants on their counterclaim for default of the second trust deed note and foreclosure of the subject property.

Counsel for plaintiffs is directed to submit pro-

posed judgment and findings to me within ten days from date hereof.

Dated: This 3rd day of November, 1955.

/s/ BEN HARRISON,
Judge.

[Endorsed]: Filed November 3, 1955. [57]

In the United States District Court for the
Southern District of California, Central Division
No. 17831-BH

JACK W. S. FARNELL, et al.,

Plaintiffs.

vs.

GEORGE WESLEY STONE, et al.,

Defendants.

JUDGMENT

The above-entitled action came on regularly for trial on the 9th day of August, 1955, before the Honorable Ben Harrison, Judge, sitting without a jury, G. V. Cutler, Esquire, appearing as attorney for plaintiffs and William Jerome Pollack, Esquire, appearing as attorney for defendants, and the Court having heard the evidence and the arguments of counsel and having considered the briefs of counsel filed herein and having fully considered the same, and having made its Findings of Fact and drawn its Conclusions of Law;

Now, Therefore, It Is Ordered, Adjudged and Decreed:

That plaintiffs have and recover of and from defendants the sum of \$15,000.00 as damages:

That defendants recover nothing by reason of their counterclaim;

That the second Trust Deed given by plaintiffs to defendants dated December 3, 1953, of the real property described in the complaint and the note secured thereby are cancelled; said real property being in Los Angeles County, [58] State of California, and described as:

That portion of Lot 1107 of Tract 1000 as per map recorded in Book 19, page 33 of Maps, in the office of the County Recorder of said County, described as follows:

Beginning at the Southwesterly corner of the land described in the deed to Fritz Brosch, et al., recorded July 25, 1941, as Instrument No. 106, in Book 18602, page 274 Official Records of said County, said Southeasterly corner being a point on a curve concave Southeasterly, in the Northerly line of Mulholland Highway, 200 feet wide as established by the City Engineer of said City, having a radius of 600 feet a radial line to said point bears North 32° 00' 00" West; thence Northeasterly along said curve in said Northerly line through a central angle of 18° 01' 19" a distance of 188.73 feet; thence North 12° 27' West 93.83 feet; thence South

72° 33' West 248.24 feet to the Southwesterly line of said land of Brosch, et al.; thence South 42° 51' 01" East 123.55 feet to the point of beginning.

That the judgment for damages given herein is subject to the deduction of the balance of principal due on said note, together with the accrued interest to date hereof.

It Is Further Ordered, that plaintiffs do have and recover their costs herein incurred, taxed at \$37.39.

Dated this 28th day of November, 1955.

/s/ BEN HARRISON,
Judge.

Affidavit of service by mail attached.

Lodged November 15, 1955.

[Endorsed]: Filed November 28, 1955.

Docketed and entered November 29, 1955. [59]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause of action having come on regularly for trial before the Honorable Judge Ben Harrison, sitting without a jury, on the 9th day of August, 1955, G. V. Cutler, Esquire, appear-

ing as attorney for the plaintiffs, and William Jerome Pollack, Esquire, appearing as attorney for the defendants, and the Court having heard all the testimony, and the cause having been submitted to the Court and the Court having ordered that the parties submit briefs on the points of law involved in the case, and said briefs having been duly filed herein and the Court having examined the same and being fully advised in the premises, makes its Findings of Fact and Conclusions of Law, as follows:

Findings of Fact

The Court finds as follows:

I.

That the plaintiffs Jack W. S. Farnell and Elisabeth Pattee Farnell are, and at all times mentioned in the complaint on file herein were, husband and [61] wife.

II.

That the defendants, George Wesley Stone and Hildegard W. Stone are, and at all times mentioned in the complaint were, husband and wife.

III.

That it is true that on or about the 8th day of October, 1953, the defendants offered to sell to the plaintiffs the defendants' residential real property described by street and number as 13751 Mulholland Drive, Beverly Hills, California, situated in the County of Los Angeles, State of California, and more particularly described as follows, to wit:

That portion of Lot 1107 of Tract 1000 as per map recorded in Book 19, Pages 33 of Maps, in the office of the County Recorder of said County, described as follows:

Beginning at the Southwesterly corner of the land described in the deed to Fritz Brosch, et al., recorded July 25, 1941, as Instrument No. 106, in Book 18602, Page 274 Official Records of said County, said Southeasterly corner being a point on a curve concave Southeasterly, in the Northerly line of Mulholland Highway, 200 feet wide as established by the City Engineer of said City, having a radius of 600 feet a radial line to said point bears North $32^{\circ} 00' 00''$ West; thence Northeasterly along said curve in said Northerly line through a central angle of $18^{\circ} 01' 19''$ a distance of 188.73 feet; thence North $12^{\circ} 27'$ West 93.83 feet; thence South $72^{\circ} 33'$ West 248.24 feet to the Southwesterly line of said land of Brosch, et al., thence South $42^{\circ} 51' 01''$ East 123.55 feet to the point of beginning; and

It is true that in making this offer, the defendants made the following representations to plaintiffs:

1. That defendants were the owners in fee of the said residential property;
2. That the improvements thereon consisted of a main residence, [62] a three-car carport, a furnished guest house, a cesspool and septic tank, a swimming pool, walks, driveways, landscaping and other appurtenances, all of which were on the land

hereinabove described and were part and parcel of defendants' residential property owned by them in fee.

3. That the said residential property was well worth the price asked by defendants, namely, the sum of \$38,000.00;

4. That defendants would sell the said property to plaintiffs for the sum of \$38,000.00 on the following terms and conditions:

(1) The total purchase price of \$38,000.00;

(2) A cash down payment of \$6500.00;

(3) An assignment of a note in the face amount of \$5,250.00 carrying interest at the rate of 7% per annum on the unpaid balance, payable full on or before April 15, 1955, and secured by a second trust deed on the former home of the plaintiffs;

(4) The assumption of the obligation to pay and discharge a note secured by a first trust deed on the subject property, the balance of which was then the sum of \$15,083.64;

(5) A note in the sum of \$11,166.36, payable at the rate of \$85.00 or more per month until March 5, 1955, and thereafter at the rate of \$100.00 or more per month, together with 6% interest on the unpaid balance made by plaintiffs, payable to defendants, and secured by a second trust deed on the subject property hereinabove described;

(6) The defendants, as Sellers, would at their cost, furnish plaintiffs, as Buyers, a policy of title insurance in a reputable title insurance company.

IV.

It is true that the defendants were the owners in fee of that land described hereinabove, but it is not true that the improvements thereon consisted of the main residence, a three-car carport, a furnished guest house, a cesspool and septic tank, a swimming pool, walks, driveways, landscaping and [63] appurtenances; and it is true that the boundaries of said land owned by the defendants were in truth and in fact such as to leave one-third of the main residence, all of the three-car carport, the furnished guest house and a proportionate amount of the real property entirely off the defendants' land and on Mulholland Drive owned by the City of Los Angeles; and it is untrue that defendants' land as it actually existed was worth \$38,000.00.

V.

It is true that plaintiffs relied upon plaintiffs' representation and that plaintiffs accepted defendants' offer and did purchase defendants' said residential property hereinabove described, and on or about December 30, 1953, plaintiffs received title thereto and gave to defendants the contractual consideration therefor.

VI.

It is true that the boundary lines of the real property sold by defendants to plaintiffs excluded from the property hereinabove described and sold by defendants to plaintiffs about one-third of the main residence, the three-car carport, the furnished guest

house, the entrance driveway and other appurtenances.

VII.

It is true that had plaintiffs known the falsity of defendants' representation as set out in these Findings hereinabove, that they would not have purchased the said property.

VIII.

It is true that as a direct and proximate result of defendants' misrepresentation as aforesaid, plaintiffs were damaged in the sum of \$15,000.00.

IX.

It is true that plaintiffs made, executed and delivered to defendants the note and trust deed referred to and set out with particularity in Paragraphs III and IV (mismumbered V) of the counterclaim, and it is true that plaintiffs have paid thereon the sum of \$680.00, and it is true that the plaintiffs have not paid to the defendants the balance of the face amount of said note, plus the accrued interest. [64]

Conclusions of Law

From the foregoing facts, the Court concludes:

I.

That in making the sale of residential real property as set out in the Findings hereinabove, the defendants committed both constructive and actual fraud under the California law governing this case.

II.

That plaintiffs have a right herein to sue for damages.

III.

That the defendants are not entitled to foreclose the Trust Deed set out in their counterclaim, the said Trust Deed and the note secured thereby should be cancelled, and the amount thereof be deducted from the judgment in paragraph IV.

IV.

That plaintiffs are entitled to judgment in the sum of \$15,000.00, and for their costs herein incurred or expended.

Done in open Court this 28th day of November, 1955.

/s/ BEN HARRISON,
Judge.

Affidavit of service by mail attached.

Lodged November 15, 1955.

[Endorsed]: Filed November 28, 1955. [65]

[Title of District Court and Cause.]

NOTICE OF ENTRY OF JUDGMENT

To Defendants, George Wesley Stone and Hildgarde W. Stone and to Wm. Jerome Pollack, Esquire, Their Attorney:

You, and Each of You, Will Please Take Notice, and you, and each of you are hereby notified that

judgment in the above-entitled action in accordance with the Findings and Conclusions of Law filed herein was entered in favor of the plaintiffs and against the defendants in the sum of Fifteen Thousand (\$15,000.00) Dollars on the complaint, and that defendants recovered nothing by reason of their counterclaim, plaintiffs to have their costs herein incurred.

Dated: November 30, 1955.

/s/ G. V. CUTLER,
Attorney for Plaintiffs.

Affidavit of service by mail attached.

[Endorsed]: Filed December 1, 1955. [67]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT
COURT OF APPEALS

To the Plaintiffs in the Above-Entitled Action:

You Will Please Take Notice that the defendants George Wesley Stone and Hildegard W. Stone hereby appeal to the United States Court of Appeals for the Ninth Circuit, from the judgment in favor of plaintiffs and against the defendants, entered in the above-entitled action on November 29, 1955.

Dated: December 27, 1955.

/s/ LEO SHAPIRO,

Attorney for Defendants George Wesley Stone and
Hildegarde W. Stone.

Affidavit of service by mail attached.

[Endorsed]: Filed December 28, 1955. [69]

In the United States District Court, Southern
District of California, Central Division

No. 17831-BH

JACK W. S. FARNELL and ELISABETH PAT-
TEE FARNELL,

Plaintiffs,

vs.

GEORGE WESLEY STONE and HILDE-
GARDE W. STONE,

Defendants.

Honorable Ben Harrison, Judge Presiding.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Tuesday, August 9, 1955

Appearances:

For the Plaintiffs:

G. V. CUTLER, ESQ.

For the Defendants:

WM. JEROME POLLACK, ESQ.

Tuesday, August 9, 1955—10:00 A.M.

The Court: You may proceed, gentlemen.

The Clerk: Jack W. S. Farnell and Elisabeth Pattee Farnell vs. George Wesley Stone and Hildegarde Stone, No. 17831-BH.

Mr. Pollack: Ready for the defendants, Your Honor.

Mr. Cutler: We are ready, Your Honor.

The Court: You may proceed, gentlemen.

Mr. Cutler: If Your Honor please, I would like to show the listing in this case to counsel to see if we can stipulate as to its admission in evidence.

Mr. Pollack: We will stipulate that these documents may be received.

The Court: They will be admitted and the clerk will mark them.

The Clerk: Do you want them marked separately or together?

Mr. Cutler: Together as a group.

The Clerk: Plaintiffs' Exhibit 1.

(The exhibit referred to was marked Plaintiffs' Exhibit 1 and received in evidence.)

Mr. Cutler: The plaintiff would like to call Mr. Deutsch. [3*]

ANTON DEUTSCH

called as a witness by the plaintiffs, being first sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Anton Deutsch.

Direct Examination

By Mr. Cutler:

Q. Mr. Deutsch, where do you reside?

A. Sherman Oaks, in the Valley.

Q. That is in this county? A. Yes.

Q. And what is your occupation?

A. Real estate broker.

Q. Are you associated with any other broker?

A. Yes, Chavin.

Q. Where is your office?

A. 14415 Ventura Boulevard, Sherman Oaks.

Q. Sometime in the latter part of 1953 did you see a listing of property located on Mulholland Drive that had been listed by Mr. and Mrs. Stone in that office? A. Yes.

Q. And did you have any inquiries about a sale?

A. Yes.

Q. Did you talk with Mr. and Mrs. Farnell about the purchase of that? [4] A. Yes.

Q. About when did that occur?

The Court: Just a moment, gentlemen.

I have had preliminary statements from counsel on both sides. Can't you stipulate to a number of these facts?

As I understand from the statements of counsel

(Testimony of Anton Deutsch.)

this property was sold by the seller to a purchaser and afterwards the property was surveyed and it was found that all the improvements were not on the property sold.

Mr. Pollack: That is correct, Judge Harrison.

The Court: There had been a mistake as to the boundaries.

Mr. Cutler: That is so stipulated and that is the fact.

The Court: Now, why do we have to go through all this detail when the main story is very simple?

Mr. Cutler: May I, Your Honor, in this case then refer to only two or three questions in regard to statements made by the parties as to the boundaries?

The Court: Yes.

Q. (By Mr. Cutler): You later then showed the property to Mr. and Mrs. Farnell, the final purchasers of the property, did you, Mr. Deutsch?

A. Yes.

Q. And did you have a chance to talk either with Mr. Stone, the owner, or with his wife, Mrs. Stone? A. I talked to Mrs. Stone. [5]

Q. Mrs. Stone. And did she at that time when you were on the property point out to you what it included?

A. Not in that respect. The only thing we discussed were terms and financing more than anything else.

Q. Did she at any time refer to the boundaries?

(Testimony of Anton Deutsch.)

Mr. Pollack: I object to that. The witness said no.

The Court: I think he can answer the question.

The Witness: No.

Q. (By Mr. Cutler): Did she show you whether or not the carport was on the property?

A. She showed us that the carport was there.

Q. And the guest house? A. Yes.

Mr. Pollack: Just a moment. I object to the testimony unless it is given in question and answer form.

The Court: Just a moment. I will take care of that.

Mr. Pollack: I move to exclude the answer, Your Honor.

The Court: Who did you first interview on that property when you went out there?

The Witness: Well, actually, I submitted an offer to Mrs. Stone.

The Court: You talked to Mrs. Stone?

The Witness: Yes.

The Court: Did she show you the property?

The Witness: No. It wasn't the property—the property [6] was obviously there and she showed us the features of it like the construction and layout.

The Court: What did she show you in that respect?

The Witness: Just the fact that it is a two-story house and she showed us the guest house, the inside of it and where the pool was.

The Court: Showed you where the pool was?

(Testimony of Anton Deutsch.)

The Witness: Yes.

The Court: Show you where anything else was?

The Witness: Yes. There is a road in back of it which she showed us, where there is a circular drive.

The Court: How about the carport?

The Witness: She showed us where it was because you drove right into it.

The Court: You drive right into it?

The Witness: In driving down, yes.

The Court: And you had a listing?

The Witness: Yes.

The Court: On the property?

The Witness: That is right.

The Court: Where is that listing?

Mr. Cutler: Is this the listing here?

The Court: I thought you said that was the escrow.

Mr. Cutler: This is the original listing with Mr. Deutsch and Mr. Chavin, is that right? [7]

The Witness: Yes—not with me but with Mr. McNally.

Q. (By Mr. Cutler): He was with the same broker? A. Same office.

Q. Did you have that with you when you went out there? A. I had a copy of it, yes.

The Court: You had a copy of it?

The Witness: Yes.

The Court: May I see it, counsel? I notice on here it says something about a guest house now being rented for \$175 per month.

(Testimony of Anton Deutsch.)

The Witness: Yes.

The Court: Did she show you that property?

The Witness: Yes.

The Court: And "a terrific view" too?

The Witness: Yes.

The Court: I can't read this writing. It is nearly as bad as mine.

The Witness: Look at the photostatic copy.

The Court: You just had this property listed as a certain address, didn't you?

The Witness: That is all.

The Court: I think that is all the questions I have to ask.

Q. (By Mr. Cutler): Do you recall that you were requested by the prospective purchasers, Mr. and Mrs. Farnell, to find [8] out from Mrs. Stone where the southern boundary was?

A. No, I don't.

Q. And do you recall any further conversation with Mrs. Stone as to the southern boundary?

Mr. Pollack: Just a moment, your Honor. As I understand the testimony there is no evidence that he had any conversation regarding any boundary. The question propounded assumes a fact not in evidence.

The Court: I will ask a question. Did you discuss the size of the lot?

The Witness: We discussed it generally in the beginning.

The Court: What was said, do you know?

The Witness: An acre almost.

(Testimony of Anton Deutsch.)

The Court: With Mrs. Stone?

The Witness: Yes, I believe so. I never met Mr. Stone. He was in New York.

The Court: And what was said about the boundary of the property?

The Witness: Just the general size of it—almost an acre.

The Court: What?

The Witness: That it was almost an acre or three-quarters of an acre.

The Court: Did she point out where the lines were or anything? [9]

The Witness: No. We weren't frankly, interested in that at the time. I was trying to put over an offer and the terms of an offer but we didn't bother too much about boundaries or anything. It was just whether they would accept it or not.

Mr. Cutler: That is all.

The Court: May I ask, gentlemen, was this property sold by lot number?

Mr. Pollack: Meets and bounds—I am not sure about it.

Mr. Cutler: This was a portion—there was a portion sold as a portion of a lot, your Honor, and then there are metes and bounds description. The deed refers to that portion 1107 of Tract 1,000, and then beginning at the southwesterly corner and going around metes and bounds.

The Court: Why don't you introduce the deed?

Mr. Pollack: I will stipulate it may go into evidence.

Mr. Cutler: We will offer it next in order.

The Court: Admitted.

The Clerk: Plaintiff's Exhibit 2 in evidence.

(The exhibit referred to was marked Plaintiffs' Exhibit 2 and received in evidence.)

The Court: Call your next witness.

Mr. Cutler: Mr. Jones. [10]

DON P. JONES

called as a witness by the plaintiffs, being first sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Don P. Jones.

Direct Examination

By Mr. Cutler:

Q. Mr. Jones, you reside in the county here, do you? A. I do.

Q. What is your occupation?

A. I am a licensed land surveyor.

Q. What are your qualifications?

A. I am licensed in the——

The Court: Just a moment.

Mr. Pollack: I am willing to stipulate with regard to the surveyor—there is no question about that.

Q. (By Mr. Cutler): Let me ask then in regard to that. Did you bring with you a survey you had made for Mr. Farnell about December, 1953, on his property upon Mulholland Drive? A. I did.

(Testimony of Don P. Jones.)

Q. Would you kindly produce a copy of that?

(Handing document to Mr. Cutler.)

Mr. Pollack: It may be stipulated that that survey may be received in evidence, your [11] Honor.

The Court: Do you stipulate it is a correct survey?

Mr. Pollack: Yes.

The Court: The clerk has just called my attention to the fact there is no record of a waiver of a jury in this case.

Mr. Pollack: The record may show on behalf of the defendants that a jury is waived.

Mr. Cutler: We concur in that waiver, your Honor.

Q. (By Mr. Cutler): I would like you to point out if you will, please, by referring to one of these drawings, Mr. Jones——

The Court: Give him the one that has been introduced in evidence.

The Clerk: Plaintiff's Exhibit 3 in evidence.

(The exhibit referred to was marked Plaintiffs' Exhibit 3 and received in evidence.)

Q. (By Mr. Cutler): Mr. Jones, I show you Plaintiff's Exhibit 3 which is your survey of the property and I wish you to point out to the lines you established of the lot. Do you care to come over here, Mr. Pollack?

Mr. Pollack: Thank you very much. I am

(Testimony of Don P. Jones.)

familiar with it and I said it may be offered in evidence.

Q. (By Mr. Cutler): I wish you would point out to the court where the boundaries lie as to the property and where [12] you established the south boundary line.

A. The boundary is this heavy line with the curve being the southerly boundary. This is the location of the car port which is south of the boundary line.

Q. Where is Mulholland Drive?

A. It is from this line southerly 200 feet wide.

Q. What portion of the improvements then lie outside of the boundaries of this property? Would you point to them as you refer to them?

A. The entire carport and part of the two-story house; all of the guest house and part of your paving and concrete patio.

Q. Now, this is on a steep mountainside, is it not? Would you kindly refer to the edge of the brink or fill for the house, please, show where that is?

A. The topography is indicated by this dashed line. This is fairly level in here and then this is the bottom of a bank coming down from Mulholland Drive. This is the access road from the paved portion of Mulholland Drive to the parking area.

Q. Approximately how much higher is Mulholland Drive up here which is used as a highway, how much higher than the level of the carport and residence? A. I would estimate 25 feet.

(Testimony of Don P. Jones.)

Q. About 25 feet? [13] A. Yes.

Q. And then you have indicated a line on the top of the bank. Is that the top of the bank?

A. Yes, sir.

Q. And then beyond that to the northward what is the condition? It is a steep bank downward?

A. Apparently there has been a fill.

Mr. Pollack: Just a moment. I object to the question as leading and suggestive.

The Court: You are getting pretty technical this early in the morning, counsel. May I ask is there room to move that house back?

The Witness: Not without moving something else.

The Court: What else would you have to move?

The Witness: The pool, the guest house would have to go approximately where the pool is. In other words, it cannot be moved this way because of the condition of the ground. This is the edge of the bank here and in my opinion this is as close to the edge of the bank now as it should be. It would have to be moved over in this area here which would——

The Court: How about the house?

The Witness: The house could be moved back——could be moved northerly.

Q. (By Mr. Cutler): Would there be any room then for the carport? [14]

A. There would be barely enough room. At the best it would be very close. It would depend on the condition of the ground here. I doubt it—I doubt it would be able to move this far.

(Testimony of Don P. Jones.)

The Court: There would be room between the guest house and the residence, wouldn't there, for the carport?

The Witness: Well, if the guest house went in here there might possibly be room here, but it would be a very crowded condition.

The Court: We are living in a very crowded period and age, aren't we?

Q. (By Mr. Cutler): Moving it forward as you have suggested, Mr. Jones, would eliminate the pool?

A. That is correct.

Mr. Cutler: You may cross-examine.

Cross-Examination

By Mr. Pollack:

Q. Actually, Mr. Jones, there is room there to accommodate the house and the carport and the guest house regardless of how it would be worked out? There is enough land to accommodate those three buildings, isn't there?

A. I believe so.

Q. And the pool could be moved over to the extreme edge of it?

The Court: You can't move a swimming pool, counsel. You [15] would have to build a new one, wouldn't you?

Mr. Pollack: That is what I meant, your Honor.

Q. (By Mr. Pollack): There is room to build a pool at the edge of the property, isn't there?

A. I wouldn't want to build a pool at the edge

(Testimony of Don P. Jones.)

of a bank because of your side condition. I don't think it would stay there. You would have to have enough buffer from the edge of the bank because the weight of the pool and the water in it would give you a tremendous push.

Q. How many feet of buffer do you think you would need?

A. Approximately what is shown there. I would say 20 foot.

Q. Now, when you say that you didn't think the house could be moved in this direction, what you had in mind, had you not, was taking the house and moving it in its entirety off of its present foundation, is that correct?

A. That is true, except the house and carport in the same relationship there—there is not enough room on the level area to move it back so they would both fall within the lot.

Q. That is the carport, but the house itself encroaches only about 10 feet on one side and 13 feet on another side. Is that about right?

A. Correct.

Q. And so all you would have to do would be to move the [16] house back that distance to get it off the encroachment?

A. Yes, sir, plus any building set-back.

Mr. Pollack: That is all.

Mr. Cutler: Thank you, Mr. Jones. You may be excused.

The Court: Call your next witness.

Mr. Cutler: Mr. Bachr.

P. D. BAEHR

called as a witness by the plaintiffs, being first sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: P. D. Baehr.

Direct Examination

Mr. Cutler: Your Honor please, we are presenting Mr. Baehr as an expert appraiser and I would like him to take his qualifications.

Would you state those, please?

The Witness: Your Honor, I have had 25 years' experience in appraising with the California Bank from 1926 until 1942.

During that time I had experience in all phases of real estate selling, buying, mortgage loans and appraising.

I was a member of the Branch Location Committee, member of the Real Estate Loan Committee and as chief appraiser when I resigned in 1942. And since 1947 I have been an independent appraiser.

The Court: Do you belong to any societies? [17]

The Witness: Yes, I do. The Los Angeles Realty Board, American Institute of Real Estate Brokers, American Right-of-Way Association, American Institute of Real Estate Appraisers.

Q. (By Mr. Cutler): And are you acquainted with the subject property in this case, Mr. Baehr?

A. Yes. I was given an assignment to make an appraisal of the property.

(Testimony of P. D. Baehr.)

Q. Have you seen this survey map that was prepared by Mr. Jones, who was just on the stand, Plaintiffs' Exhibit 3?

Mr. Pollack: I object to any question regarding this property. The evidence thus far does not disclose that this witness is an expert in the particular type of property and in the particular location that is the subject of this lawsuit.

The Court: Well, do you want to spend more time on that?

Mr. Pollack: I would like to briefly take this witness on voir dire if I may, your Honor.

The Court: You want to take him on voir dire?

Mr. Pollack: Yes.

The Court: Very well, you may do so.

Voir Dire Examination

By Mr. Pollack:

Q. Mr. Baehr, have you ever appraised any property on Mulholland Drive?

A. Yes, I have. [18]

Q. How recently?

A. The most recent one—I don't recall exactly, but I think about four months ago.

Q. Whereabouts on Mulholland Drive was it?

A. I can't recall the address. It was east of the subject property.

In 1953 I made an appraisal of property located at 3285 Coy Drive, which is at Mulholland and Beverly Glen. That is about three-fourths of a mile

(Testimony of P. D. Baehr.)

from the subject property. It was residential property.

Q. That was about two years ago?

A. 1953, right.

Q. Of course the value of property in that area fluctuates, does it not, from year to year?

A. Well, my appraisal assignment was to appraise property as of the date of the sale which was 1953.

Q. And what other properties have you surveyed or appraised in that area?

A. Oh, I have appraised properties all over Los Angeles County. I can't recall. Many properties in the Valley, Sherman Oaks, Sepulveda Drive—Boulevard. I can't recall offhand. I have appraised very many properties.

Q. Do you know what canyon this property is near?

A. Well, it is near Beverly Drive. It is west of Laurel Canyon. It is near Coldwater Canyon. You go up [19] Coldwater Canyon and Beverly Drive.

Q. Have you appraised any properties recently on Beverly Drive or Coldwater Canyon?

A. I don't recall any on Beverly Drive. I have appraised properties on Coldwater Canyon, I believe lower down—not up on Mulholland Drive.

Q. What is your present business, sir?

A. I am a real estate broker and appraiser.

Q. Do you spend most of your time as a broker or most of your time as an appraiser?

A. My time is spent appraising.

(Testimony of P. D. Baehr.)

Q. Have you ever testified in court regarding the value of any property in that area?

A. Yes. I have testified in the Los Angeles Superior Court, Los Angeles Municipal Court and United States Federal Courts. I have made appraisals for the Lands Division of the Department of Justice.

Q. With regard to property in the area that we are talking about?

A. No, not on Mulholland Drive. An appraiser has assignments all over everywhere.

Q. I understand that but I am particularly interested in property in that area.

A. I believe I have answered that.

Q. Four months ago you think you appraised a piece of [20] property on Mulholland Drive, is that correct?

A. I am sure I appraised one. I don't recall whether it was exactly four months. It may have been this year sometime, the first of the year.

Q. You don't remember the address of that property?

A. I don't remember it, no. It was a single family residence. It was a property that the owner wished to sell and wanted to get the market price.

Q. Was this appraisal in connection with a listing that you were taking on it?

A. I didn't take the listing. They retained me to set a market value of the property.

Q. Did they pay you for doing that?

A. Yes, they did. I don't work without pay.

(Testimony of P. D. Baehr.)

Q. I mean were you employed as an appraiser?

A. I was employed as an appraiser.

Q. Now, aside from that piece of property and the other piece that you say you appraised two years ago, have you appraised any other property on Mulholland Drive?

A. I can't recall any specific property at this time. I know I have looked at Mulholland Drive many times but I can't recall any specific property.

Q. How close is the nearest piece of property that you do recall having appraised?

A. Three-fourths of a mile. [21]

Q. On what street was that?

A. That was on Coy Drive. It is right off of Beverly Glen and Mulholland Drive.

Q. How long ago was that? A. 1953.

Q. That is the same piece of property?

A. That is right.

Q. What did you say was the nearest canyon to this house on Mulholland that is the subject of this lawsuit that you appraised?

A. The nearest canyon?

Q. Yes.

Mr. Cutler: I don't believe the question is clear. Did you say that he appraised?

Mr. Pollack: I understood that he has appraised the Farnell property.

Mr. Cutler: Yes.

Mr. Pollack: And I want to know if he knows

(Testimony of P. D. Baehr.)

what the nearest canyon is to the Farnell property.

The Witness: On the southerly side I assume you are speaking of?

Q. (By Mr. Pollack): Yes.

A. Well, there is Laurel Canyon, Coldwater Canyon. I can't recall right now the name of the canyons along there but they are all on the south side. The street ends at [22] Mulholland Drive.

Q. Don't these canyons run north and south?

A. That is right. They end at Mulholland Drive and the subject property is on the north side of Mulholland Drive.

Q. Well, assuming Mulholland Drive runs generally east and west what would it be near?

The Court: I don't think that is a proper question on voir dire. I want to know what this man has done in preparation for this appraisal. You worked for the Land Division. You know what you have to do.

The Witness: Yes, but I wasn't asked——

The Court: I am asking.

The Witness: All right, sir.

The Court: What did you do in preparing yourself for this appraisal?

The Witness: I made an inspection of the property and all improvements. I secured a map and studied the survey.

I checked the public records for sales to find sales comparable to the property.

I found one of a vacant lot practically joining the

(Testimony of P. D. Baehr.)

subject property of about a half acre. It sold—may I give the complete reference or do you just want it for——

The Court: Counsel, in this case we are not interested so much in the value of the lot. It is the location of the improvements on the lot that the complaint is about. Isn't [23] that true?

Mr. Pollack: I was trying to determine how well acquainted with the area this man is and apparently he doesn't know Benedict Canyon is the nearest canyon.

The Witness: I couldn't think of the name of it.

Mr. Pollack: That is all the voir dire I have, your Honor.

I object to the question on the ground that this witness does not appear to be sufficiently familiar with the values of property in the area of the property—that is the subject property of this lawsuit.

The Court: Objection is overruled. I don't think, gentlemen, in this case we are so much interested in the value of the lot as we are interested in the amount of money it will cost to put this property in a proper setting.

Mr. Pollack: That is right.

The Court: Isn't that true?

Mr. Pollack: That is very true.

Mr. Cutler: I think, if your Honor please, it would be very pertinent to show the value of the property in December of 1953 as if the purchaser had gotten what he thought he was getting, the

(Testimony of P. D. Baehr.)

value of that property as a unit with the improvements on it.

The Court: I thought everybody was satisfied with what they paid for the property if they had gotten what they [24] thought they were getting.

Mr. Cutler: That is right.

Mr. Pollack: That is true.

The Court: In other words, the sale price was \$38,000.

Mr. Cutler: If we had gotten the property——

The Court: The purchaser was satisfied until he found out their house wasn't on the lot that they thought they bought and the seller was satisfied because he sold the property. Isn't that true?

Mr. Pollack: That is correct, your Honor.

The Court: So the whole question here is what damage has resulted by reason of the house not being located on the property.

Mr. Pollack: That is correct.

Mr. Cutler: That is right, your Honor. Now in that connection then, Mr. Baehr, did you make an appraisal of the property in the first instance as to what it would be worth as it appeared if the purchaser had gotten what he saw?

Mr. Pollack: Object to the question, your Honor. I think it is material. I think we are agreed on that.

Mr. Cutler: As a preliminary matter I want to establish that and then ask him what his appraised value was of the property at that time as it actually surveyed.

(Testimony of P. D. Baehr.)

The Court: I think we can assume the property was worth \$38,000 had the improvements been on the land that the [25] plaintiff here thought he was getting, can't we?

Mr. Cutler: We can do that, your Honor, yes. I would like to state one thing——

The Court: Then what was the property worth in the condition that it finally developed it was in. That is what we are interested in.

Mr. Pollack: That is right.

Q. (By Mr. Cutler): Would you give us the answer to that question which the court has propounded, the value as it was actually existing?

A. In my opinion the market value as the property actually existed is \$10,600.

My market value of the property as it appeared to exist was not \$38,000. There was personal property involved which cut the value down.

Q. However, in adding on the \$2,500 value of personal property you did arrive at essentially the same figure, did you not?

A. That is correct.

Q. \$37,000? A. Correct.

Q. Then as it actually existed you have given a market value at that time of \$10,600?

A. That is correct.

Mr. Cutler: Cross-examine. [26]

(Testimony of P. D. Baehr.)

Cross-Examination

By Mr. Pollack:

Q. How did you arrive at the figure of \$10,600?

A. Well, I took into consideration the actual size of the usable lot, the size, condition of the improvements as they existed.

Q. Let us take one thing at a time. You say you took into consideration the actual size of the usable lot. is that correct?

A. That was one of the factors, yes. There were many more factors.

Q. Yes, I understand that. Now, what did you figure that was worth?

A. The size as it actually existed if unimproved in my opinion would have had a market value of \$5,000.

Q. When you searched the records did you find any sales for any lots for the sum of \$5,000 in that area?

A. Yes. The adjoining property sold for \$4,500.

Q. How did that compare in size?

A. The adjoining property was larger.

Q. How do you know it was larger?

A. Well. from the maps.

Q. You can't tell from a map. can you, what the usable size of a lot is?

A. I can from an inspection. [27]

Q. You said you determined it from a map.

A. I said that was part of it. I said from a map and the inspection.

(Testimony of P. D. Baehr.)

Q. You mean you went out there and looked at the property?

A. It is visible from the Farnell property.

Q. I am just saying you stood on the Farnell property and looked at this adjoining lot?

A. And I talked to the owner.

Q. Let us take just one thing at a time. You talked to the owner of the lot? A. Yes.

Q. And where was the owner when you talked to him? A. The owner?

Q. Yes.

A. I talked to him here in the courtroom.

Q. That was just this morning, wasn't it?

A. Yes. I talked to him here this morning.

Q. And prior to talking to him this morning you never talked to him before, did you?

A. No, I never talked to him before. It was a verification.

Q. We will come to that.

A. I have a right to answer your question.

Q. Well, go ahead. Tell me when you are through. [28] A. I am through.

Q. Now, you went out on the Farnell property and you looked next door at this lot, is that correct?

A. That was part of the investigation, yes.

Q. In addition to that you looked at a map of the property? A. I checked the maps.

Q. Where did you check the map?

A. I checked the assessor's records. I have a copy of the map.

(Testimony of P. D. Baehr.)

Q. That you did in the Hall of Records or Hall of Justice?

A. That was the official map. That is where I would generally go.

Q. I wanted to know where you went to look at it.

A. Hall of Records—in the assessor's office.

Q. Where is the assessor's office.

The Court: What do we care?

Mr. Pollack: I would like to find out whether he actually went there.

The Witness: I assure you I did.

Q. (By Mr. Pollack): You went to the assessor's office and you stood on Farnell's property and in that way you determined the usable size of that lot?

A. Well, that was generally, yes. [29]

Q. Did you do anything else?

A. In what respect?

Q. Well, did you locate the lot lines?

A. No, I didn't make a survey. That wasn't my job.

Q. Without a survey you couldn't actually tell, could you, the usable size of that lot?

A. Well, it is now improved. The appearance of it would appear to be a certain size.

Q. You couldn't tell where the boundaries were, could you?

A. I made no survey. That is not my business.

Q. You didn't walk over the lot? A. No.

(Testimony of P. D. Baehr.)

Q. How many square feet is there that is usable in the lot next door?

A. I would just have to guess at that.

Q. I don't want you to guess. Did you ever determine the number?

A. I can go out and measure it but I would have to guess at it here.

Q. So even to this day you don't know the number of square feet in that lot, do you?

A. No, I don't know the number of square feet.

Q. Do you know the number of square feet in the Farnell lot? [30]

A. Yes, sir.

The Court: Do you know the number of square feet in this building?

Mr. Pollack: I am not testifying here.

The Court: I was just wondering.

Shall we put the surveyor back on the stand to show how many square feet of usable ground there are here, counsel?

Mr. Pollack: I think your Honor is missing my point. This witness testified that he came to an opinion regarding the value of the Farnell lot by comparing it with a lot next door.

Now, my point is unless he knew the number of square feet in the lot next door he had no basis for comparison. It might have been a lot more or less.

The Witness: May I make a correction? I did not state I was comparing the value of the lot next door in this case. That is only one factor.

The Court: Counsel, let us find out how he arrived at this figure of \$10,600 for this property. Let

(Testimony of P. D. Baehr.)

us break it down and find out what comprises that figure.

Did you consider the availability of moving some of this property?

The Witness: Yes, your Honor.

The Court: What did you figure it would cost to move that house? [31]

The Witness: There were bids on that. The cost to relocate, decorate and landscape was around \$13,-200.

Mr. Pollack: Just a moment, your Honor—I object to that. This man is depending upon some hearsay—something that has been told to him.

The Court: That is what all appraisers do.

Mr. Pollack: In their field, though. He is not appraising real estate when he is appraising the cost of moving a house.

The Court: Now, just a moment. Let us be fair here. The court is interested in finding out if this property can be relocated on that lot and if so what it would cost.

Now, if this man can give us some help on it why not have him do so?

Mr. Pollack: I am just as anxious for that help as you are, your Honor.

The Court: You don't seem to be.

Mr. Pollack: Well, I just thought we ought to get it from someone in the business of moving houses and not from a real estate appraiser. That is just my thought in the matter.

(Testimony of P. D. Baehr.)

The Court: Well, if he has an estimate here from somebody do you want to bring them in?

Mr. Pollack: I would rather they brought in their mover.

Mr. Cutler: We have a call in for Harry Bernasconi who made a careful estimate here and I have here his estimates [32] in the file. He should be here at 2:00 o'clock. I thought perhaps we wouldn't need him until 2:00. He should be here at 2:00 o'clock. Possibly the court might permit this testimony subject to his appearing.

Mr. Pollack: That will be all right.

The Court: Proceed.

The Witness: Other factors I considered in affecting the market value was the size of the site in relation to the existing improvements, and that if the existing structures were relocated the site would present a very crowded appearance which would, in my opinion, definitely affect the market value of the property from a purchaser's standpoint.

Then of course the cost to relocate the improvements and the cost of landscaping and even though the improvements were relocated the difficulty in financing the improved property and other factors were considered in the situation—the style of the house. It was originally a duplex which had already been remodeled once. The guest house has been added onto at various times and the situation would be better if it were developed with a more modern type of house.

Of course the location of the pool in the center

(Testimony of P. D. Baehr.)

of the lot definitely would restrict the location of the improvements to the best advantage.

The Court: How many rooms does that house have in it?

The Witness: The house has, if I recall, seven rooms, [33] seven rooms and two baths. And on the first floor there was a rumpus room with a fireplace and a bar, three bedrooms and the bath.

The house was originally built in 1947. It was remodeled in 1951 and 1953. There was a large bedroom, dining room, storage room and kitchen and bath.

The house had 2,380 square feet in it. The guest house was on a concrete slab foundation. It was built in 1948. It had four rooms and a bath. The rooms are in tandem arrangement. There is no central hall. You go from one room to another. It is a nice, attractive guest house but the construction is such that it would be rather difficult to move. It could be moved but it would be difficult to move to advantage.

The carport was built in 1953. It is open on three sides. The rear line is concrete blocks against the bank. The back originally had a reinforced concrete retaining wall and when the carport was rebuilt the building department required restrengthening so they put a concrete wall in which now becomes part of the retaining wall as well as the rear line of the carport.

It would be very difficult to move the carport to any advantage on the existing lot. I have marked

(Testimony of P. D. Baehr.)

up one of the surveys showing the lines of the usable site and the location of the improvements. [34]

Q. (By Mr. Cutler): Do you have that with you? A. Yes.

Q. What have you attempted to show here, Mr. Baehr? A. (No answer.)

The Court: This is really cross-examination and I was interfering, counsel.

Mr. Pollack: I think that had to do with his voir dire.

The Court: He said he was your witness, counsel.

Mr. Pollack: Then he started in to ask some more questions but if he is through I would like to continue on if I may.

Mr. Cutler: Yes.

Q. (By Mr. Pollack): What did you think it would cost to build that house?

A. May I have the question again, please?

Q. What is your opinion as to how much it would cost—— A. To build the house?

Q. Yes.

A. I don't know what it cost to build the house in 1947. I made no appraisal of that. My appraisal was as of December, 1953.

Q. What would it have cost in 1953 to build that house? A. My estimate——

The Court: It isn't a question of what it cost to build the house, but what the house was worth. [35]

A house built in 1947 would be a different house than one you were building in 1953.

(Testimony of P. D. Baehr.)

Mr. Pollack: Part of the house, your Honor, was rebuilt, I believe, in 1954 but I won't press the point.

The Court: You figured this on a footage basis?

The Witness: Yes.

The Court: And you said there are 2,800 feet?

The Witness: 2,300.

The Court: 2,300?

The Witness: That is right.

The Court: What did you figure?

The Witness: My estimate of the replacement value in 1953 was, for the residence, \$8.50 a square foot.

Q. (By Mr. Pollack): How about the guest house?

A. The guest house had 848 square feet and the replacement value, according to my estimate, was \$7.00 a square foot.

Q. And what did you figure the car port was worth?

A. 704 square feet at \$2.50 a square foot. And then there was the pool and landscaping which was also a part of the improvements.

The Court: What did you appraise the pool at?

The Witness: I allowed \$4,000 for the pool. It is not a finished pool. It had the appearance of being rather homemade. I don't know who built it.

The coping was lacking on the pool. It had a filter [36] system but no heating system, no diving board but a ladder which was added subsequent to the purchase.

(Testimony of P. D. Baehr.)

I made an allowance of \$2,000 for landscaping. That totaled \$33,890 to save you adding.

Q. (By Mr. Pollack): Thank you. Now these estimates that you got regarding the cost of moving, whose estimates have you used?

A. Star House Movers' estimate.

Q. And what is the date of that estimate?

A. I don't recall the date. I don't have it with me.

Mr. Cutler: We have the estimate here.

Mr. Pollack: Well, I will ask for it in just a moment.

Q. (By Mr. Pollack): All you were shown was an estimate by the Star House Moving Company?

A. I was willing to accept that figure although in my opinion it probably would cost more to move the house because of the condition of the house, the foundation and the possibility of running into some filled ground at the back. That was uncertain although for this market value I was willing to accept that estimate.

Q. Did you ever move a house yourself?

A. No, I never did.

Q. You were never in the house moving business?

A. No, but I have seen a lot of houses moved.

The Court: The court has had some experience in house [37] moving and I will tell you if you have to do it don't try it.

Q. (By Mr. Pollack): If the guest house was removed completely there would be ample room for

(Testimony of P. D. Baehr.)

the pool, the car port and the house, is that correct?

A. Well, I wouldn't say ample. I would say that you could get the house on the lot. The house can be moved on the lot and so can the guest house but you wouldn't have the same type of property. It would make it an entirely different type of property.

Q. But if you eliminated the guest house you would have ample room for the car port, the pool and the house?

A. Well, it depends on how you define "ample." I would say no, you wouldn't have ample room. The square footage wouldn't be available.

Q. You would have the extra room that you didn't have if you didn't rebuild the guest house, isn't that true? A. To rebuild it?

Q. In other words, you can get it all on the usable part of that lot, can't you, but you say it would be a little crowded?

A. I made a sketch to scale and moved the house around on the lot and you can put them on the lot but as far as being ample space in my opinion it would not be.

Q. Now, if you eliminated the guest house you would [38] have all the room you want, isn't that true?

A. No. You would have an entirely different property. It would be entirely different. You wouldn't have the same type of property. You wouldn't have the guest house.

(Testimony of P. D. Baehr.)

Q. Well, I am just talking about your position that because of the guest house, the carport, the pool and the main house that it would be a little crowded, isn't that what you said?

A. If they were relocated on the existing situation—existing site, yes.

Q. Now, if you eliminated the guest house you would have ample room?

The Court: That is self-evident, counsel. If they eliminate part of the improvements they would have more room.

Mr. Pollack: That is all.

Redirect Examination

By Mr. Cutler:

Q. In connection—we might offer in evidence this diagram that he has drawn here for possible relocation.

The Witness: That is no relocation on that map.

Q. (By Mr. Cutler): Did you have a drawing for the relocation?

A. No, just an overlay.

Q. Perhaps then that would not be so usable. That is all, then. By the way, did you take pictures of the place [39] while you were there?

A. Yes, I took some photographs.

Mr. Cutler: If your Honor please, it might help in visualizing this matter to have the photographs in. I would like to show counsel some of the photographs. They might be of some benefit to the court in visualizing this situation a little better.

(Testimony of P. D. Baehr.)

(Documents handed to Mr. Pollack.)

Mr. Pollack: I think it should be explained to the court. I have no objection to them.

The Court: Those are pictures of the property?

Mr. Pollack: Yes.

The Court: Are they pictures of different portions of the property?

Mr. Cutler: Yes, from different points of view. The different portions of the premises are shown and also the structures.

The Court: Have them introduced as one exhibit in the envelope.

Mr. Cutler: We offer these, if your Honor please, as Plaintiffs' Exhibit No. 4.

The Court: Admitted.

(The exhibit referred to was marked Plaintiffs' Exhibit 4 and received in evidence.)

Mr. Cutler: That is all, Mr. Baehr, thank [40] you.

The Court: Call your next witness.

Mr. Cutler: You are excused as far as the plaintiff is concerned.

The Court: May this witness be excused?

Mr. Pollack: Yes.

Mr. Cutler: Mr. Deutsch and Mr. McNally may be excused and is there any objection to excusing Mr. Jones, the surveyor?

Mr. Pollack: He may be excused.

Mr. Cutler: We would like to call Mr. Bernasconi of the Star House Movers.

HARRY BERNASCONI

called as a witness by the plaintiffs, being first sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Harry Bernasconi.

Direct Examination

By Mr. Cutler:

Q. Mr. Bernasconi, you reside here in the county? A. Yes, I do.

Q. And you are in business?

A. I am the manager of Star House Movers.

Q. And about how long have you been so engaged?

A. I have been with the firm for 28 years.

Q. During that time you have personally and as manager of the company moved many houses, have you not? [41] A. Yes, I have.

Q. And were you called by Mr. Farnell in this case, to make an estimate of moving certain houses on the property at 13751 Mulholland Drive?

A. I was.

Q. And was that about October of 1954, last year?

A. Yes. The letter dated to him was in October so it was around the 1st of October.

Q. Did he ask you to give him an estimate as to the cost of moving the carport and guest house and residence so they would all be on his lot?

(Testimony of Harry Bernasconi.)

A. He did.

Q. And did you do that?

A. Yes, I did.

Q. And what was the cost as you estimated it?

A. Well, this letter I wrote confirming my verbal bid to Mr. Farnell was for \$7,400. This bid included the moving and installing new foundations and replacing the floor joists which are now dry rotted, and reconnecting the plumbing, stuccoing the exterior of the bottom of the building, all electrical repairs, replacing the fireplace, replacing the porches and all the flat work and reconnecting the plumbing.

Q. That was for which structure?

A. That was for the main house. That did not include any painting or decorating. [42]

Q. That would be in addition?

A. That is right.

Q. And your estimate of the moving—after moving the house would it be necessary to do any painting and redecorating?

A. Yes. It is always necessary. In the way that house is built there are several walls that have to be replaced because the house is built against a bank and the retaining wall is a portion of the main body of the building which will be lost in the moving of the building. Those will have to be replaced and replastered.

Q. Did you make any estimate as to what that additional cost would be?

A. No, we did not make any additional estimates

(Testimony of Harry Bernasconi.)

on the painting or decorating, but this included replacing those walls.

Q. Now, did you make an estimate as to moving any other portion of the structures?

A. Yes. We made a figure estimate on moving the guest house.

Q. And what was that, please?

A. Well, I don't have that. I believe I had the repairs to the guest house which consisted of putting in a new floor and reconnecting the plumbing, but which did not include any floor covering. The figure on that was \$1,980, plus [43] \$1,500 on the moving.

Q. Making a total of \$3,380?

A. That is right, on the guest house.

Q. Did you make somewhat of an estimate as to the condition the houses would be in as to proximity, closeness and so on to the lines after you made that kind of a move?

A. Well, we didn't go into too much detail.

Mr. Farnell, I believe, had a plot plan there and it showed the building would have to be moved, I believe 23 feet, to be on his property.

Q. That was the main residence?

A. That is right.

Mr. Cutler: You may cross-examine.

Mr. Pollack: No cross-examination.

The Court: That is all.

Mr. Cutler: If your Honor please, are you going to take a recess this forenoon? If so, we would have a chance to confer with another witness here.

The Court: We will take a recess of five minutes at this time.

(Short recess.)

The Court: You may proceed.

Mr. Cutler: Your Honor please, I would like to call Mr. Deutsch to the stand for one further question. Would you come to the stand again, Mr. Deutsch? [44]

ANTON DEUTSCH

a witness called by the plaintiffs, having been previously sworn, resumed the stand and testified further as follows:

Further Direct Examination

By Mr. Cutler:

Q. Mr. Deutsch, at the time you were negotiating a sale with the Farnells, did you go over the property and have a conversation with Mrs. Stone?

A. Yes.

Q. And did she point out to and make any statement about the boundary around the carport and guest house?

Mr. Pollack: Just a moment. I think the witness has said four or five times that there was no discussion whatsoever regarding boundaries. He said further that he went out there just for the purpose of submitting an offer. He testified he was anxious to put the deal across and that he did not discuss boundaries and I think it is improper.

(Testimony of Anton Deutsch.)

The Court: Just a moment. I think that is correct. Isn't that what you testified to?

The Witness: That is approximately correct, but there was one thing that I didn't realize.

The Court: There is one thing that you forgot to tell us about?

The Witness: Yes.

The Court: What reminded you of it? [45]

The Witness: Well, actually it was brought to my attention by Mr. Farnell's attorney.

While we were negotiating there was a question about splitting the property because Mr. Farnell wanted to buy it without the guest house if it could be arranged and we were negotiating on that basis the first time and at that time she gave me a map showing where they had thought of doing it and showing how it could be cut off and she showed me on the map and also in the general way that it could be cut off by splitting it somewhere along the middle and taking the guest house off and letting the pool and the main house remain as one piece, which they were interested in, and then keeping the guest house.

Q. (By Mr. Cutler): In doing that was anything said about the boundary near the guest house?

Mr. Pollack: Just a moment. I object to that. He already told the story. Now, this is the fifth time he has told a story of eliminating any reference to the boundary. Now he is asked for the sixth time was there a conversation about the boundary.

The Court: I think that was asked a number of times, counsel.

Mr. Cutler: Any cross-examination?

Mr. Pollack: No.

The Court: That is all. Call your next [46] witness.

BRUCE D. WILFONG

called as a witness by the plaintiffs, having been first sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Bruce D. Wilfong.

Direct Examination

By Mr. Cutler:

Q. Mr. Wilfong, what is your occupation?

A. I handle the new construction and new business with the Southern California Gas Company.

Q. And were you so connected and employed in the latter part of 1953? A. Yes, sir.

Q. Were you called by the Stones to come to their property on Mulholland Drive?

A. Yes. I was contacted by a number of the people up there to make an estimate of what it would cost to run gas from Benedict Canyon up to serve this group of people there.

Q. In doing that you went right onto the property, did you? A. Yes.

Q. And did you have occasion to meet Mr. or Mrs. Stone or both of them? A. Yes.

Q. Did you meet their neighbor, Mr. Frank Peters? [47] A. Yes.

(Testimony of Bruce D. Wilfong.)

Q. What did you do in connection with giving them an estimate as to what it would cost?

A. Well, first we measured the distance required to run a main up there and then the measurements required to run services down to the meter location at the houses.

Q. And the main would have been located on Mulholland Drive? A. Yes, that is right.

Q. And then you took an estimate——

Mr. Pollack: Just a moment. Can we get the time this took place, your Honor?

The Court: 1953, wasn't it?

Mr. Pollack: More definite than that.

The Witness: Yes, I can give you some definite information on that. I was up there and signed some papers with the different people on—this was in March of 1953 and later on I released a gas service down to the house in April of 1953.

Q. (By Mr. Cutler): That was on the Stone property, was it not? A. Yes.

Q. And gas was actually connected there, you said, in April of 1953?

A. No. That is when I ran the gas service into the gas meter and the turn-on is called for whenever the customer [48] requests it but the service is in there and available when we release it to them.

Q. Now, in connection with making the estimate as to the cost for running from the main down to the house, did you and Mr. Peters—did he assist you in running the line—taking the measurements?

A. Yes. He assisted me in making the measure-

(Testimony of Bruce D. Wilfong.)

ments for the service to be installed at his house.

The Court: You mean Mr. Stone's house?

The Witness: No, Mr. Peters' house.

Q. (By Mr. Cutler): And he is a neighbor adjacent to—an adjacent neighbor to the Stone property? A. That is right.

Q. Was Mrs. Stone present when you and Mr. Peters were there doing that?

A. Well, at the time Mr. Peters and I were making this measurement we were a considerable distance apart. It is quite a ways down to his house from the property line at Mulholland Drive. I can't truthfully say since there has been quite a time elapsed since then, whether she was there or not. But as I said we were quite a distance apart, some 100 feet apart.

Q. However, do you recall that you saw her there near Mr. Peters'—

Mr. Pollack: Just a moment. The witness already said [49] he cannot truthfully say whether she was there.

Q. (By Mr. Cutler): I was asking whether or not he meant with himself or whether she was in the neighborhood.

A. Well, it is possible for him to have seen her and me not have seen her, I suppose.

The Court: You don't remember any conversation at which she was present?

The Witness: No. I have no conversation with her.

Q. (By Mr. Cutler): Did you have a conversa-

(Testimony of Bruce D. Wilfong.)

tion with Mr. Peters? A. Yes, I did.

Q. But you are not positive whether or not Mrs. Stone was there? A. No, I am not positive.

Q. You don't know whether she was present or not? A. No.

Q. Then we would like to excuse this witness and put Mr. Peters on the stand.

The Court: That is all.

Mr. Cutler: Just a moment.

Q. (By Mr. Cutler): Did you have a conversation with Mr. George Stone, Mr. Stone, as to the boundaries? A. I can't recall.

Q. Right now you don't recall talking either with Mr. or Mrs. Stone? [50]

A. Yes. I recall talking with them but whether it was exactly about the boundaries or not I don't know. I had considerable money to collect from the people for the main extension.

Q. Do you recall what you told them in regard to the distance it would be from the main to their house?

A. Yes. I have the distances right here.

Q. Did you talk it over with them and give it to them? A. (No answer.)

Q. Did you give the estimate to Mr. and Mrs. Stone?

A. There was no estimate to be made there. There are allowances set up by the gas company as to how many free feet of service we can run to a customer for the appliances that they are installing.

Since this was well under what was required or, I

(Testimony of Bruce D. Wilfong.)

am sorry, since the distance required there was less than the allowances they had there was no need to talk to him to any extent on the main extension. The deposit was made and the papers were signed and we ran the service.

I have a sketch here showing approximately how many feet it was from the property line to the heater location.

Q. And what is that distance?

Mr. Pollack: How would that be material, your Honor?

The Court: Well, I don't know. I am not sure. I thought I would listen to the evidence. It may be connected up in [51] some manner.

Mr. Pollack: Very well.

The Witness: In the case up there, since the terrain is up and down we had to take a measurement running along the top of the ground from the property line to the set-up meter location. At that time I set it at 25 feet. The crew, when they went out to install the service, installed 42 feet so that is what it was from the property line to the meter location.

Now, we went down and crossed over but that is the total length of pipe. In other words, that is the total length of pipe that we installed there.

Q. (By Mr. Cutler): In what portion of the house was the meter installed?

A. The meter was installed 10 feet back from the right front corner of the house on the right-hand side as you are facing it from the street.

(Testimony of Bruce D. Wilfong.)

Q. The total distance that you installed pipe was 42 feet? A. Yes, sir.

Q. Did you tell the Stones where the boundary line was as you installed this or while you made the survey?

A. I think we discussed it because I have on my sketch here—I show the property line running at an angle across—through the carport. [52]

Q. Your best recollection is that you did have such a discussion with the Stones?

A. I will put it this way. I usually talk it over with a customer.

The Court: But you didn't know whether you did or not?

The Witness: No, sir, not to be positive.

Mr. Cutler: That is all. You may cross-examine.

Cross-Examination

By Mr. Pollack:

Q. This property line that you are talking about, where did you get the information on that?

A. From our survey crew. They go up before we install a main. They go up and stake the location of the installation of the main.

Q. As I understand your testimony you don't remember telling either Mr. or Mrs. Stone anything about where the property line was, is that correct?

A. As I said, I can't remember positively whether we discussed that or not.

Mr. Pollack: That is all.

The Court: Call your next witness.

FRANK QUEEN PETERS

called as a witness by the plaintiffs, being first sworn, was examined and testified as follows:

The Clerk: State your full name. [53]

The Witness: Frank Queen Peters.

Direct Examination

By Mr. Cutler:

Q. Mr. Peters, you reside near the Farnell residence, do you, on Mulholland Drive?

A. Immediately to the east.

Q. Did you hear the testimony of Mr. Wilfong in regard to the preliminary survey to introduce the gas to your place?

A. I did. I beg your pardon, it wasn't introducing the gas to my place. That was to the Stones' residence. Mine was later. My house was not completed at that time.

Q. You are adjacent to the Stones' place?

A. On the road.

Q. And you were on the road there working with Mr. Wilfong? A. Yes, sir.

Q. Was your house in the road, too?

A. No, sir. That is a private road which runs from Mulholland north and down to our house on the point which is immediately, almost immediately adjacent and a little bit forward or north of the Stones' residence at that time.

Q. In doing the measurement there with Mr. Wilfong, was there any conversation between you and him as to where the boundary line of Mulholland

(Testimony of Frank Queen Peters.)

—the end of the easement was of Mulholland [54] Drive?

A. Very definitely.

The Court: Who is "Jim"?

Mr. Cutler: "Between you and him," meaning

Mr. Wilfong, the gas man?

The Witness: Yes.

The Court: Who were present?

The Witness: Mr. Wilfong and myself. It is my distinct impression that Mrs. Stone was in front of the house. I am not certain of that. I did not make any notes on it but I am sure, I feel certain that she was somewhere there in the front part of the location.

At that time I did not expect to be called as a witness. I made no definite remarks about it but I am sure she was there. She usually was around at that time of day.

Q. (By Mr. Cutler): Did Mr. Wilfong indicate where the——

The Court: Just a moment. Was Mrs. Stone where she could hear the conversation or part of it?

The Witness: I think that would call for a conclusion on my part, that she could hear. I don't know whether she could hear it or not. I know she was out in front—to the best of my recollection she was out in the front of the building.

The reason we had this measurement, your Honor, was so I would save money in bringing the gas down to my place. We had to establish the easement line which is approximately 122 [55] feet from the center. Otherwise I would have to pay so much per

(Testimony of Frank Queen Peters.)

foot for that gas line before they would start the work so Mr. Wilfong got up on Mulholland Drive and found the center marks, which he had determined, and we ran down to where I had been told the easement was. We checked it and we found that it was within about six inches or so one way or the other of where the easement began. I wanted to establish where that line was.

Q. (By Mr. Cutler): Now, as you talked to Mr. Wilfong there was quite a distance between you?

A. Yes, we were 112 or 125 feet apart. We had to yell because there is a lot of wind and noise up there, cars going by. You have to yell to be heard.

Q. And what was said at that time about the boundary?

Mr. Pollack: Just a moment. It hasn't been established satisfactorily that either Mr. or Mrs. Stone were present. The clear import of his testimony is that she was usually around there. He is not sure exactly where she was. There is no evidence as to the proximity between him and either Mr. or Mrs. Stone.

The Court: You don't know whether Mrs. Stone was present at that time or not, do you?

The Witness: No, sir. It is a little over two years ago.

The Court: You can't say? [56]

The Witness: I can't say definitely. I will not say definitely she was there. I know Mr. Stone was not there because I hadn't seen him in a long time. Mrs. Stone was usually around and I had seen her

(Testimony of Frank Queen Peters.)

that day. I know that because I found out from her about this gas company proposition and that is how Mr. Wilfong came up and measured it.

I thought we had to use butane. Mrs. Stone was kind enough to tell me the new gas line was coming in. I got in touch with Mr. Wilfong and he came up and we measured so I would know where the line was. I was very much confused because there was houses on both sides of me closer to Mulholland and yet the line was running down toward my house and I couldn't figure it out.

The Court: I don't see how this witness' testimony would be binding upon Mrs. Stone, counsel. It isn't worth very much.

Q. (By Mr. Cutler): In connection with the bringing in of the gas you did have some conversations with Mrs. Stone, did you not? A. I did.

Q. Did she say anything that would indicate that she knew——

The Court: Fix the time and place, counsel.

Q. (By Mr. Cutler): Do you remember about when that was?

A. Yes. It was some time around May because my house was [57] in process of construction. I didn't know the gas was coming in. I wanted to find out from Mrs. Stone from whom they took butane and how much it was and so forth and she kindly told me the gas was coming in there at that time.

Q. And you went over to her house and had the conversation there? A. Yes.

Q. And she was present? A. Yes.

(Testimony of Frank Queen Peters.)

Q. What was said if anything about the nearness of the line—where the main line would be?

A. As I remember she had a butane tank at the back of the carport and it was going to be taken away from there and I said, "Well, where are they going to bring in the gas?"

I wanted to know for my own reasons because I am down further and I have to pay for it. And she said, "Well, they are going to bring it into the house wherever the meter was to go."

Q. Was anything said about the distance?

A. She said "to the house."

Q. Was there any further conversation about the gas?

A. There was a little conversation about who had the deed on the road or the easement because the gas company would have to go down—Mrs. Stone was under the impression, I believe, she at least intimated as such to me, that she had [58] the easement. I then spoke to Mr. Stone the first and only time and asked him, "Well, Mr. Brush (phonetic) was in Korea," the man we bought the property from. I asked him to be kind enough to help me. I wanted to get the thing straightened out. He agreed to it but before it was necessary I had the thing back from Korea and I had my deed and at that time it was necessary to have this deed in order to determine the easement so they could bring the pipeline down my road.

Q. Was there anything said in your conversation

(Testimony of Frank Queen Peters.)

that you related with Mr. Stone or the one with Mrs. Stone, to indicate that they knew that the line ran through their residence?

Mr. Pollack: Just a moment. That would call for a conclusion of the witness.

The Court: It is leading, too. Was there anything said at that time about that pipeline and the carport?

The Witness: They told me, and you are referring—I am speaking to Mrs. Stone?

The Court: Yes, either one of them.

The Witness: No. I never spoke of anything with Mr. Stone except to explain to him that I didn't have an easement recorded as yet and it was holding up the building, so I wanted him to help me, which he kindly agreed to do, but before it was necessary I got my easement—I had the easement on the road and we couldn't find a record of anybody else [59] having it.

Mr. Wilfong came along at that time and solicited gas customers. I have a pool and we have electricity going in there. I wasn't sure I wanted gas in there if I had to pay the \$175 plus my footage, so I had a number of talks with Mr. Wilfong.

We spent quite a bit of time because that is a system up there that is a crazy setup with metes and bounds and nobody around there could give me any information and finally I got hold of the former owner and he told me my property, as of all property along there, the easement line went from where

(Testimony of Frank Queen Peters.)

the posts were and that was the easement line on both sides and that is the way it was.

And I agreed that the gas be put in and they measured and allowed me for the 122 feet before I had to start paying, plus my appliance allowance.

Q. (By Mr. Cutler): Did you have any further conversation with Mrs. Stone that you have not related?

A. No. Did you say Mrs. Stone or Mr. Stone? Mr. Stone was away.

Q. Mrs. Stone?

A. Mrs. Stone was away for a short time. You are familiar with the property there. There is quite some distance between the two properties although they are adjacent. They weren't around much. I didn't have any conversation with [60] her. The only thing that I do know is that she was there and she was probably aware of the fact I was there.

Mr. Cutler: Any cross-examination?

Mr. Pollack: No cross-examination.

The Court: That is all. Call your next witness.

Mr. Cutler: Mr. Farnell, would you take the stand?

JACK W. S. FARNELL

called as a witness on behalf of the plaintiffs, being first sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Jack W. S. Farnell.

Direct Examination

By Mr. Cutler:

Q. Mr. Farnell, you are one of the plaintiffs in this action, are you not? A. That is correct.

Q. We want to limit your testimony especially to conversations with either Mr. or Mrs. Stone in connection with the boundaries of the property.

Now, at any time during the negotiations and prior to the actual completion of the purchase by you of this property, did you in the presence of Mrs. Stone talk about the boundaries—where they were? A. I did.

Q. About when and where was that? [61]

A. Well, that was just prior to the consummation of the sale. I would like to go back a moment.

Q. Was there anyone else present?

A. My wife was present. I would like to go back a moment, if I may, and tell in my own words, if that is all right with you.

Q. All right.

Mr. Pollack: Your Honor, I object to it. I think the examination should be conducted by question and answer form so I may have an opportunity to object to improper questions.

(Testimony of Jack W. S. Farnell.)

The Court: I think we had better follow that line.

Q. (By Mr. Cutler): What prior occasion do you refer to, Mr. Farnell?

A. Prior to purchasing the home we were dealing with Mr. Deutsch, who was representing Chavin Realty. We asked him where the southern boundary of the property was and he agreed——

Mr. Pollack: Just a moment, your Honor. I object to any conversation had with Mr. Deutsch. There is no evidence that the defendants made any representations to Mr. Deutsch.

The Court: He was their agent, wasn't he?

Mr. Pollack: He was—I think he was an—he was employed by a brokerage firm to sell the property but that wouldn't give him the right to make representations regarding the property aside from what was in the written listing. The [62] listing has been offered and received in evidence by stipulation and unless it be shown that Deutsch had authority to talk about things outside of that listing I don't think this witness is competent to testify. I think it would be pure hearsay against the defendants.

Mr. Cutler: He certainly was the agent that negotiated the sale, made all the representations.

The Court: Counsel, you may be correct. There may be a question about it and I think we had better avoid it.

Mr. Cutler: All right.

Q. (By Mr. Cutler): At that conversation was anyone else present besides Mr. Deutsch? Was Mr. or Mrs. Stone present?

(Testimony of Jack W. S. Farnell.)

A. When I discussed the boundaries originally with Mr. Deutsch?

Q. Yes, the time you referred to just now.

A. No. That was in our home with my wife present. I asked Mr. Deutsch where the southern boundary was.

Q. Just a moment. Neither of the Stones were present?

The Court: Let us get down to when you were on the property and you were talking to Mr. and Mrs. Stone.

The Witness: My wife was present We were both talking to Mrs. Stone on the property.

Q. (By Mr. Cutler): What part of the property?

A. We were on the southern portion of the property [63] right near the back of the carport.

Q. What was said?

Mr. Pollack: May we have when this conversation took place?

The Court: About when was this?

The Witness: This was just prior to the time that we finally decided to buy the property. I can't give you the exact date but it was within five or ten days prior to the time that we decided to purchase the property.

Mr. Pollack: What month was that?

The Court: I believe we have the record here when the deal was made.

Mr. Pollack: Very well, your Honor. The deal took three months to consummate so I would like to

(Testimony of Jack W. S. Farnell.)

know with a little more particularity as to the time if he can give it.

The Court: Can you give us any better date?

The Witness: All I can say, your Honor, is that it took place prior to the time—the first time we decided to buy the property.

The Court: And you don't know when that was?

The Witness: Well, I would say it was somewhere in October.

The Court: 1953?

The Witness: Yes, 1953.

Q. (By Mr. Cutler): And would you relate what was said [64] by you and——

A. I asked Mrs. Stone where the boundary to the property was. She told me that it was south of the carport and south of the guest house.

The reason I asked that question was because they have a 6 by 6 post that is holding up one end of the carport and it seemed peculiar to have it located in that spot and if I bought the property I wanted to move it. So, I asked her where the boundary was and she told me that the reason the post was there was so all the improvements would be located on their property and that if it was moved over to the retaining wall it would be on Mulholland Drive.

Q. Was there any other conversation between you and either of the Stones with reference to the location of that particular boundary line?

A. I don't recall of any other conversation.

Mr. Cutler: You may cross-examine.

The Witness: She came out and she pointed with

(Testimony of Jack W. S. Farnell.)

her arm just exactly where the boundary went and I had no basis to question her any further other than Mr. Deutsch had also told me——

Mr. Pollack: Just a moment.

The Court: We are eliminating what he said to you. [65]

Cross-Examination

By Mr. Pollack:

Q. Mr. Farnell, who was it that indicated with their hand where the property line was?

A. Mrs. Stone.

Q. And was Mr. Stone present?

A. He was not. He was in New York. So, Mrs. Stone stated——

Q. Where were you standing when she indicated with her hand where the property line was?

A. We were standing right on where she represented the property line to be. She asked us to walk back, which we did, and she said "It runs right along here, south of the guest house and south of the carport."

Q. Did she say how far south?

A. Only to the extent that if I moved this post about five feet I would be on the city property.

Q. Did she say anything else to indicate how far south the property line was?

A. She told me that all the improvements were on the property.

Q. How did she happen to tell you that?

A. I asked the question.

(Testimony of Jack W. S. Farnell.)

Q. What question did you ask?

A. I asked her where the property line was. It was a [66] very normal question. I would do that on any piece of property that I was buying.

Q. You asked her where the property line was, is that correct? A. That is correct.

Q. And what did she say?

A. I think I have answered that, Mr. Pollack.

Q. Well, just tell me once more.

A. She told me the property line was south of the carport and south of the guest house and she pointed out with her hand the position south of both the guest house and the carport and said, "It runs along there."

Q. Did she say anything else?

A. Well, we talked about many other things, about the purchase of the property.

Q. I mean with regard to the boundary?

A. No, sir, not that I recall. She did say one other thing. She told me that the road that is east of the property was on the property we were purchasing and that she had—she told us that she had given permission to Mr. Peters to use the road. That is all she said.

Q. That is all she said?

A. That is all I can recall.

Q. Then she did not say that all the improvements were on the property? [67]

A. She made the specific statement that all the improvements were on the property.

Q. Don't you know, Mr. Farnell, when you re-

(Testimony of Jack W. S. Farnell.)

peated the story just a few seconds ago you forgot to mention that?

The Court: No, he didn't.

The Witness: I don't believe I did.

Mr. Pollack: May we have the portion read—it will take only a moment, where I asked him the question and where I said "What did she say?"

The Court: Read the last few questions and answers.

(The record was read.)

Mr. Pollack: Do you get my point?

The Court: No, I don't. The witness already testified that she said the improvements were on the property. He told you that twice.

Mr. Pollack: And then I said, "How did she happen to tell you that," and he said, "Well, I asked—I always ask—I would always ask if I were going to buy a piece of property."

The Court: He said that was a normal question to ask.

Mr. Pollack: So I said to him, "All right, now tell me what she said," and he said, "I have already told you." I said, "Well, tell me once more," and when I asked him to tell it the second time he forgot or he omitted the statement that she said the improvements were all on the property. Certainly he said it the first time but when he was asked to [68] repeat it the second time he said, "Why, I have already told you."

The Court: All right.

(Testimony of Jack W. S. Farnell.)

Mr. Pollack. Of course that should go to his credibility. There is no point in arguing that right now, but I have reason to believe he wouldn't mention it the second time he was asked.

Q. (By Mr. Pollack): And so as I understand your testimony, Mr. Farnell, you asked her where the boundary was and in response to that question she said the improvements were all on the property?

A. That is not the way I testified.

Q. Tell us the way you did testify.

A. I told you and I repeat again——

The Court: I don't want to hear it again. It has been asked and answered.

Mr. Pollack: All right.

Q. (By Mr. Pollack): Now, up until the time you came to court this morning did you ever—by the way, after you found out that part of the improvements were not on the property that you owned, you wrote some letters, did you not, to Mr. Stone? A. I wrote one letter to Mr. Stone.

Q. And that was immediately following the discovery of where the lot line was? [69]

A. No, that is not correct.

Q. What is correct?

A. Do you want me to go into a narrative of it?

Q. No, all I am asking is for the time.

A. I can't explain it properly to you unless I tell you what I did.

Q. All right.

A. Well, I went down to the City Engineer's office and I checked with a Mr. Bagley (phonetic).

(Testimony of Jack W. S. Farnell.)

He got out all the City Engineer's maps and showed me their survey. He also told me that there was a possibility that maybe these surveys were incorrect due to the fact that they had been made, as I understand it, a number of years back. So then——

Q. I am not——

A. Let me finish my answer. So I called the surveyor and I had the surveyor survey the property.

Q. I don't think I should be bound by this testimony.

The Court: This isn't hurting you any, counsel.

Mr. Pollack: Of course it isn't so far but I don't know what he is going to say and I don't want to be bound by what he says. He can talk, I don't mind that, but I don't want to be bound by anything he says because it is not responsive to my question.

The Court: There is no dispute between you as far as the fact that the improvements are not on the lot and he is telling [70] you what he did after he found out about it. You asked him whether he communicated immediately with your client.

Mr. Pollack: No, I asked him when it was with reference to the time he found out about that that he wrote a letter to my clients.

The Court: How long was that?

The Witness: It was after Jones and White made a survey of the property. I wanted to verify it.

The Court: You have answered the question.

Q. (By Mr. Pollack): Shortly after or immediately after——

A. I would say that there was an elapse in there

(Testimony of Jack W. S. Farnell.)

from the time they finished the survey of about, oh, I would say a week or three weeks from where I first had reason to believe that the improvements were not on the property.

Q. And you wrote a letter to Mr. Stone?

A. That is correct.

Q. Now, in that letter you didn't make any mention of the fact that either he or his wife had pointed out any——

The Court: Just a moment. The letter will speak for itself, counsel. If you have a letter he wrote produce it and it will speak for itself.

Mr. Pollack: Well, I will be very glad to introduce it at 2:00 o'clock, your Honor. I have to go through the file but I will be very glad to offer the letter. I just don't want to take the time now to go through the file and look for [71] it, but if your Honor prefers I will be glad to get it out very quickly.

The Court: Well, it is pretty close to 12:00 o'clock. We will take a recess at this time until 2:00 o'clock this afternoon.

(Whereupon at 12:00 o'clock noon a recess was taken until 2:00 o'clock p.m. of the same day.) [72]

Tuesday, August 9, 1955—2:00 P.M.

The Court: You may proceed. Have you finished with the witness?

Mr. Pollack: No, your Honor. I would like to have Mr. Farnell back on the stand.

JACK W. S. FARNELL

a witness called by the plaintiff, having been previously sworn, resumed the stand and testified further as follows:

Cross-Examination
(Continued)

Mr. Pollack: I will continue my cross-examination of Mr. Farnell.

Q. (By Mr. Pollack): Mr. Farnell, how much would you sell this property for as it stands now?

A. I don't—I can answer the question.

Mr. Cutler: I don't believe that is a proper question. That is improper cross-examination.

The Court: I think it probably is improper cross-examination. He hasn't testified as to values. You can call him as your own witness when the time comes.

Mr. Pollack: I am trying to—well, I will withdraw that question for the moment.

Q. (By Mr. Pollack): When Mrs. Stone said to you the line is to the south did you ask her how far to the south?

A. Well, she said it was in between this post that I [73] made reference to and the retaining wall. The retaining wall was on the city property and from

(Testimony of Jack W. S. Farnell.)

that the post from the retaining wall is a distance of about—I haven't measured it, but I think it would be about five feet.

Q. And do you remember which way she was facing when she told you that the boundary was to the south of the guest house?

A. To the best of my knowledge I think she was turned completely around. We walked out toward that and then she said, "It goes along here," and turned around and pointed behind the guest house.

Q. Did you ask her on what it was that she made that statement regarding the boundary line?

A. No.

Q. Did you ask how she knew that was where the boundary line was?

A. No. I assumed that she knew.

Q. Did you ask whether there had ever been a survey made? A. I did not.

Q. Did she have any map with her at the time?

A. Not to the best of my recollection.

Q. Did you ever get a map from them regarding the property which would show the boundary line?

A. I had a map but I don't think you should call it a [74] map. It was a plat made by some surveying outfit and it said on it "Made for George Stone." It only calls out or draws the outline of the property. It does not include any premises on it.

Q. And do you have that copy?

A. Mr. Pollack, I am not sure that I do. I would have to go through the things we have here.

(Testimony of Jack W. S. Farnell.)

Q. Do you remember showing that map to Mr. Cutler?

A. I believe at one time I did, yes. It is not a map. I think that is an improper name for it. It is a surveyor's plat of real property just showing boundary lines with no improvements shown on it.

Q. Now, before you employed Mr. Cutler you went to see a lawyer by the name of Nichols, did you not?

A. That is correct.

Q. And isn't it a fact that when you told the facts to Mr. Nichols, you did not mention anything at all about anyone having pointed out a boundary line to you?

A. That is incorrect, Mr. Pollack.

Q. Isn't it true that it was only after you talked to Mr. Nichols that you took the position that you had been pointed out a boundary line?

A. That is incorrect.

Q. Did you ever hear prior to the time that you purchased the property that the carport encroached about two [75] feet over the property line?

A. I did not. I would not have bought the property if I had known that.

Q. Now, do you remember I came out to see you to talk to you about this case?

A. That is correct.

Q. And you took me over the property and showed me what was involved?

A. That is correct.

Q. Do you remember I asked you whether the Stones had ever attempted to point out the property lines to you?

(Testimony of Jack W. S. Farnell.)

A. I don't know whether you asked that question or not, Mr. Pollack.

Q. Do you remember you told me no, that they had not?

A. I do not remember any conversation with you, Mr. Pollack. You merely came out and stated that you were representing Mr. Stone and that you had no authority from him to attempt a settlement of any kind. You merely came out to see what the situation was and after seeing it you said, "Well, this is a question of law, the facts seem to be quite clear." I remember that extremely well.

Q. Now you know of course, do you not, Mr. Farnell, that there was a fire on that property before you bought it?

A. Mr. Stone told me there was. I did not witness it.

Q. And you know that the property was, the house, the [76] main house was rebuilt?

A. Mr. Stone told me it was.

Q. On exactly the same line on which it had been built before the fire?

A. I couldn't testify to that being accurate. Mr. Stone said that he did that. I don't know.

Q. And did you also hear that—did Mr. Stone also tell you that he spent \$25,000 repairing that house after the fire?

A. I don't think Mr. Stone ever mentioned any \$25,000 figure to me. I don't know what he spent.

Q. Now there is, of course, a likelihood that the city will vacate the land that part of the house or

(Testimony of Jack W. S. Farnell.)

the guest house and carport are now on, isn't that true?

A. The only way I can answer that, Mr. Pollack, is to say that the inquiries that I have made along that line with two members of the City Council led me, in fact they have told me that there is absolutely no possibility of doing so until the highway is actually built and the project is completed, at which time they would then sit down and consider if they would vacate the property. I don't know whether that answers your question or not.

They also stated that to the best of their knowledge the highway wouldn't be put in for another eight or nine years because of lack of funds. [77]

Q. Now, in this particular transaction Mr. Stone took back a second trust deed for approximately \$11,000, is that correct?

A. That is correct. It was slightly over \$11,000.

Q. And he has held that trust deed up to the present time?

A. I presume he has. There is a *lis pendens* action filed against it.

Q. Now, you have never felt, have you, that Mr. Stone intentionally misrepresented the boundary of the property, have you?

A. Well, you have asked me a question of opinion, Mr. Pollack, not for a fact. If you want my answer—if you want me to answer it honestly I would say yes.

Q. What is your answer?

(Testimony of Jack W. S. Farnell.)

A. I told you it would be yes, that I think that he had knowledge of it.

Q. And on what do you base that opinion that he had knowledge—that he had knowledge?

A. From the statements of the people whom we had here this morning as witnesses, who did not, in my way of thinking at any rate, when they were on this stand, change their testimony from what they have told me. I refer specifically to Mr. Peters and Mr. Wilfong.

Q. And what else besides the witnesses that you heard [78] testify today? A. That is all.

Q. So it is your belief then based upon the stories that these people you say told you outside of court—— A. That is correct.

Q. You feel that Mr. Stone knew that the property was or the improvements were, partly on city property?

A. Based on the evidence, the stories they told me prior to this court hearing, yes.

Q. Did you take into consideration the fact that Mr. Stone had spent \$25,000 to rebuild the property on exactly the same line?

A. I don't know that Mr. Stone paid \$25,000.

Q. Well, the fact that he built that, that he rebuilt it at all on the same property line, did you take that into consideration?

A. I took that into consideration, yes. I know the property was up for sale for quite a long period of time. I think I made the best offer that Mr. Stone—that anyone made and Mr. Stone accepted it and I bought it.

(Testimony of Jack W. S. Farnell.)

Q. What has that got to do with building the fire damage to the property?

A. I don't know, Mr. Pollack.

Q. How about the fact that he took back a second trust deed for \$11,000? Do you think that a man who knows that [79] the improvements are——

The Court: That is argumentative, counsel.

Mr. Pollack: Well, I am testing the basis of his——

The Court: Nevertheless that is argumentative.

Q. (By Mr. Pollack): Now, have you ever, either by way of a letter or by way of a conversation ever said to Mr. Stone that you felt that he had intentionally misrepresented the boundary line?

Mr. Cutler: I would like to inquire if this is still on cross-examination?

Mr. Pollack: Yes.

The Court: Answer the question.

The Witness: The answer—would you repeat the question?

Mr. Pollack: Will you read the question?

(Question read.)

The Witness: I don't believe so.

Q. (By Mr. Pollack): And when I was out to you house did you tell me that you felt that he had intentionally misrepresented the boundary line?

A. To the best of my knowledge, no, because this other information came up after you were out at the house.

Mr. Pollack: I think that is all the cross-exami-

nation I have, Your Honor. I will perhaps want to examine him further on direct examination.

The Court: That is all. Call your next witness. [80]

Mr. Cutler: Mrs. Farnell, will you take the stand?

ELIZABETH P. FARNELL

called as a witness on behalf of the plaintiffs, being first sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Elizabeth P. Farnell.

Direct Examination

By Mr. Cutler:

Q. Mrs. Farnell, you are the wife of the previous witness, are you? A. Yes, I am.

Q. And one of the plaintiffs in this case?

A. Yes, sir.

Q. And you heard him testify as to the time that he fixed, about October of 1953, when he testified that you and he and Mrs. Stone were on the property looking at the southern portion of it?

A. Yes, sir.

Q. Do you recall such an instance?

A. Yes. I do.

Q. And do you recall that all three of you were present? A. Yes, I do.

Q. About where were you located on the property on that occasion?

A. Toward the south—what we thought was the south [81] boundary on the black top driveway.

(Testimony of Elizabeth P. Farnell.)

Q. Near any particular improvement—the carport or the guest house or where?

A. Near the carport.

Q. And did you hear any conversation between Mr. Farnell and Mrs. Stone? A. Yes.

Q. Would you relate what you heard?

A. Well, my husband asked Mrs. Stone where the south boundary line was. She said it was between the post—of the south post of the carport and the retaining wall and showed us with her hand, going like this (indicating) it ran between that line and those points behind the guest house—between the guest house and the retaining wall behind it.

Q. Was there any further conversation at that time that you now recall?

A. Yes. My husband asked why the post had been placed where it was and she said it was put there so that it would be on the property, their own property and not on city property and that so all the improvements were on their own property.

Q. Was anything said about the retaining wall and as to where it was located, that you recall?

A. Not that I recall.

Mr. Cutler: That is all. You may cross-examine. [82]

Mr. Pollack: I have no questions.

The Court: That is all.

Mr. Cutler: That is the last witness we have, Your Honor. We will rest.

Mr. Pollack: I would like to make a motion at this time, Your Honor.

(Testimony of Elizabeth P. Farnell.)

The Court: Very well, make your motion.

Mr. Pollack: The plaintiffs having rested their case the defendants move that the complaint of the plaintiffs be dismissed and that judgment be rendered in favor of the defendants on plaintiffs' complaint on the ground that the plaintiffs have failed to establish the fact that the alleged statement regarding the location of the boundary was fraudulently made.

There is no evidence at all in this record showing or attempting to show that the defendants or either of them knew of the correct location of the boundary line.

There is no evidence that they acted fraudulently. The evidence is to the contrary, that they rebuilt their property after a fire; they took back a second trust deed in the sum of \$11,000.

Any slight suspicion that there could possibly be from the mere fact that they made any statement at all regarding the property line would be repealed by those facts. I believe that those facts are irrefutable as compared to a [83] possible suspicion attaching to the bare statement the property line "is to the south of the house."

There is absolutely not a single scintilla of evidence that these people acted fraudulently.

The Court: Motion denied. Call your first witness.

Mr. Pollack: Mr. Stone.

GEORGE WESLEY STONE

called as a witness by the defendants, being first sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: George Wesley Stone.

Direct Examination

By Mr. Pollack:

Q. Mr. Stone, coming directly to the time you purchased the property which you later sold to the Farnells, did you at the time have a survey made of that property? A. No, sir, I didn't.

Q. Did you at any time ever know where the south boundary line of the property was?

A. No, sir, I did not.

Q. Did you at any time tell the Farnells or anyone else where the boundary line was?

A. I can't remember ever discussing any boundary lines with anyone at any time.

Q. When you purchased the property where did you assume [84] that boundary line was, the south boundary line?

A. When I purchased the property I assumed that the line was somewhere between the edge of the macadam and the edge of my driveway. I wasn't placing too much importance on it. I just didn't think about it, I guess.

Q. At any time did you learn anything negatively—at any time did you learn negatively anything with regard to the location of that south boundary line?

(Testimony of George Wesley Stone.)

A. Not until I received the letter from Mr. Farnell telling me that he had had this survey made.

Q. While you owned the property did you have a fire on the premises? A. Yes.

Q. And how much damage was done to the house?

A. Well, the house was about 80 per cent damaged.

We received an insurance check I believe slightly in excess of \$15,100, something like that.

I kept a very accurate record of what I spent in rebuilding the house and as far as I can remember it was in excess of \$26,000.

Q. In other words, you spent \$26,000 to rebuild the house? A. That is correct.

Q. And did you rebuild it exactly on the same lines it had been built originally? [85]

A. Yes. The architect recommended definitely that we should rebuild on the same foundation and that is what we did.

Q. Now, what was the date of that fire, do you know? A. February 8.

The Court: Just a moment. What is the use of going into all of this, counsel? Let me ask a few questions here.

Mr. Pollack: Yes, Judge Harrison.

The Court: When did you buy this property?

The Witness: September 15, 1952, I believe it was 1952.

The Court: And when you bought it you as-

(Testimony of George Wesley Stone.)

sumed that all the improvements were on the property or the land that you bought, didn't you?

The Witness: I certainly did.

The Court: And that was the same land and same improvements that you sold to the Farnells?

The Witness: With the exception of some improvements, additional improvements.

The Court: I mean as far as the property was concerned. Somebody sold it to you and you assumed that all the improvements were on the land?

The Witness: That is correct.

The Court: And that is the way you sold it?

The Witness: That is correct, your Honor.

The Court: And you also treated all the improvements as [86] if they were on your land?

The Witness: I certainly did.

Q. (By Mr. Pollack): Now, at the time you sold the property to the Farnells how much was it worth?

The Court: What difference does that make, counsel?

Mr. Pollack: Well, to establish the value.

The Court: I thought you both agreed the sales price was a fair price?

Mr. Pollack: Yes, but this is just a preliminary statement that I want to compare the prices, your Honor.

Mr. Cutler: I think that has been stipulated to.

The Witness: \$25,000.

Mr. Pollack: Now——

The Court: You got \$38,000.

(Testimony of George Wesley Stone.)

The Witness: I guess I didn't understand the question.

The Court: You sold the property for \$38,000?

The Witness: That is correct.

The Court: Did you consider that a fair value of this property at that time?

The Witness: Oh, at that time I considered that that was—that I was selling it much cheaper than it was worth. I had invested much more than that in it.

Q. (By Mr. Pollack): Was the \$25,000 figure—

A. I misunderstood your question. I thought you asked me what the place was worth in view of the facts today as [87] we know them.

Q. Yes, and what was it worth?

A. I would say \$25,000.

Q. How much would you be willing to pay for the property today?

A. I haven't looked it over since I left it but if it is in as good shape as it was when I left it I wouldn't hesitate to say in excess of \$25,000.

Mr. Pollack: I think that is all, your Honor.

The Court: Any cross-examination?

Mr. Cutler: Just a word.

(Testimony of George Wesley Stone.)

Cross-Examination

By Mr. Cutler:

Q. You stated that you thought that you sold it a little cheap. You listed it originally with Mr. Chavin for \$39,500, didn't you?

A. I would like to say that originally it was listed with several other realtors.

Q. I am referring to Mr. Chavin.

A. Our first listing was \$46,000 if I remember. I couldn't tell you what the figure was that we finally told Mr. Chavin we would accept at the time he listed it. I couldn't say. I am sure that it wasn't as high as the first one.

Q. You knew that he advertised it for \$39,500, didn't [88] you?

A. I can't say that I did. I was in New York at the time.

Q. Your wife was really carrying on the negotiations here, wasn't she?

A. That is right.

Q. So you were really not conversant with the details of the negotiations?

A. Correct.

Q. Isn't it a fact that you got \$19,000 from the fire insurance company?

A. That is not a fact.

The Court: He said \$15,000, I think.

The Witness: As I remember.

The Court: What difference does that make? I don't see what difference it makes. If they had a fire they replaced it.

(Testimony of George Wesley Stone.)

Mr. Cutler: I don't think it makes any difference.

The Court: Then why waste time on it.

Mr. Cutler: I will withdraw the question and dismiss the witness as far as we are concerned.

The Court: All right.

Mr. Pollack: We have just one more witness. Could we have a short recess and that will wind up our case.

The Court: We have been going on for a half hour. I [89] guess we can stand a recess for a few moments.

(Short recess.)

The Court: You may proceed.

Mr. Pollack: Mrs. Stone, will you take the stand?

HILDEGARDE STONE

called as a witness on behalf of the defendants, being first sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Mrs. Hildegarde Stone.

Direct Examination

By Mr. Pollack:

Q. You are the wife of George Stone and you are one of the defendants in this case?

A. Yes.

Q. Now, I will call your attention to a conversa-

(Testimony of Hildegarde Stone.)

tion when you were showing the property and pointing out something with regard to the property line.

Do you remember that occasion? A. Yes.

Q. And who was it that you were with?

A. Mrs. Farnell.

Q. Was Mr. Farnell there?

A. I don't believe so, no.

Q. And do you recall whether you had anything with you at the time you were showing the area? [90]

A. Yes. I had a sketch that was given to me by the former owner.

Q. What was his name?

A. Keith Daniels (phonetic).

Q. And what did that sketch show?

A. Well, it showed two feet of the carport was encroaching on the Mulholland Drive property.

Q. And what else did it show with regard to the location of the guest house, the main house and the carport?

A. Everything was on—was within the lines except that probably two square feet of the carport.

Q. And what did you say to Mrs. Farnell on that occasion?

A. Well, I told her that according to this sketch that there were two feet of the carport was on city property.

Q. And did you tell her where you had gotten the sketch from?

A. Yes. I told her it came from Mr. Daniels, the former owner.

(Testimony of Hildegarde Stone.)

Q. Did you at any time state that the south boundary line was south of the guest house and the main house and the carport? A. No.

Q. Did you ever state either to Mr. or Mrs. Farnell that all the improvements were on the lot?

A. No. [91]

Q. Did you ever wave your hand and say that the south boundary line was out there, pointing to a place south of the guest house and the carport?

A. No.

Q. Did you ever have any other information regarding the location of the south boundary line other than what you have told us, up until the time you sold the property?

A. No, just that sketch—just from the map from the former owner, the one he had given to us.

Q. By the way, what did you do with the map?

A. I gave it to Mrs. Farnell.

Q. It wasn't a map—it was a sketch?

A. It was a blueprint sketch or map. There was a map showing the buildings and the property.

Q. And you gave that to Mrs. Farnell?

A. Yes.

Mr. Pollack: That is all.

Cross-Examination

By Mr. Cutler:

Q. Mrs. Stone, did you state that you received that sketch that you referred to from the former owner? A. That is right.

Q. Mr. Daniels? A. Yes.

(Testimony of Hildegarde Stone.)

Q. And what did it show in regard to the south boundary? [92]

A. The carport, one corner of the carport was on Mulholland Drive, on city property, about two square feet.

Q. You knew that at the time you purchased it, did you? A. Yes.

Q. And you talked that over with Mr. Daniels?

A. Yes.

Q. And did you make any protest about it?

A. Well, he said he didn't—he never thought that the city would come along but if they did and had to chop—if they had to chop that corner of the carport off it wouldn't make much difference.

Q. But where did he tell you the line actually was, the true line then? Was it within two feet of that corner of the carport?

A. Well, when he gave us this map it was evidence that that was where it was.

Q. That it was right along——

A. That these feet were encroaching on Mulholland Drive.

Q. What portion of the carport was that?

A. The south, I think the southeast corner.

Q. Was it the very corner or was it the inner corner of the carport—I mean was it the outer southeast corner of the carport or the interior corner of the carport? [93]

A. It was the corner that is closest to Mulholland Drive. I don't know the corner—it is the corner that is closest to the road.

(Testimony of Hildegarde Stone.)

Q. Closest to the road that Mr. Peters used?

A. No, to Mulholland Drive.

Q. Closest to your road in going out?

A. No, closest to the corner—let me see. Where is east and where is west? I think it is the southeast corner of the carport.

Q. And that would be the same as the southeast corner really of your lot then, wouldn't it?

A. Yes.

Q. It was the corner of the carport that fitted right into your southeast corner? A. Yes.

Q. And that showed, the map that you got, the sketch from the one you purchased from, showed that portion of the carport was over on city property?

A. Well, the one—the map that Mr. Daniels gave me showed the corner of the carport, on the southeast corner of the carport, was encroaching about two square feet on city property.

Q. And how far was it from the retaining wall?

A. I think it took in about, oh, maybe one foot of the retaining wall, the retaining wall being the back of the [94] carport.

Q. The back of the carport and it held back—

A. Yes.

Q. —the embankment there, I presume, did it not? A. Yes.

Q. Was that the only discussion you had with Mr. Daniels about the encroachment of the property onto city property? A. Yes.

(Testimony of Hildegarde Stone.)

Q. Did you ask him specifically whether or not he had had it surveyed?

A. Well, I think he presented this to us as a survey.

Q. Presented the sketch to you as a survey?

A. Yes.

Q. And did he explain why he had built beyond the survey?

A. I don't recall. Oh, I believe he claimed he hadn't built it.

Q. That he had not built it? A. Yes.

Q. But he did have it surveyed?

A. Well, this map had been for him—I mean he had given it to me so I assumed that was true.

Q. Did that map show who it was surveyed for?

A. That I can't recall. Now, I do remember that one map was given to us and it said down in the left-hand corner [95] that it was prepared for my husband but whether that was the map or not I am not sure. But my husband had not had it prepared and it was something that he wouldn't pay for and that was after we had been in the house a week or so.

Q. Do you know who ordered that?

A. Mr. Daniels ordered it.

Q. And charged it to your husband?

A. Yes; and we never paid that bill.

Q. Do you recall the surveyor that did that?

A. No, I wouldn't know.

Q. The one who was billing you?

A. No. My husband might have that information, but I don't.

(Testimony of Hildegarde Stone.)

Q. Did you tell the Farnells that that was the south boundary line and that it cut off two feet of this carport and went around just south of the guest house there, between the guest house and the retaining wall?

A. Well, I simply told them that according to the map this corner was on city property.

Q. Well, at that time did the Farnells make any protest about it being over the line?

A. I don't think so, no.

Q. Did they say anything at all?

A. I believe they felt the same way I did when the map had been given to us. Well, it was—— [96]

Q. Now, will you just tell me what they said and not how they felt?

A. I am sorry, but I can't.

Q. You don't recall what they said?

A. Well, they certainly didn't make any objections.

Q. Do you recall?

A. Or they wouldn't have bought it, I assume.

Q. Do you recall anything said about the post, that rather large post there that was not back against the retaining wall? Did you explain why that post was set in?

A. I am afraid I don't understand.

Q. Referring to the carport. Do you recall that there is about an 8 by 8 or 6 by 6 post right at the corner of the carport?

A. You mean a steel post?

Q. No, it is a wooden post there.

(Testimony of Hildegarde Stone.)

Mr. Pollack: I have some pictures that might be helpful so you both will know what you are talking about. You might have it marked for identification.

Q. (By Mr. Cutler): I show you here a picture produced by Mr. Pollack and presented to us that shows out here at the corner, the interior corner of the carport——

A. Yes.

Q. ——a beam or pillar that is set inside—it is not right out at the corner of the carport. Do you recall that [97] post being there?

A. Yes.

Q. Set in somewhat?

A. Yes.

Q. Do you recall whether or not the Farnells or either of them asked you why the post was set in that peculiar fashion?

A. Well, maybe—that is, no.

Q. Here is the corner of the carport and here is the post inside quite a ways supporting that.

A. Yes.

Q. Was there any explanation as to that discussed between you people at that time?

A. No.

Q. You don't recall any conversation regarding that?

A. No.

The Court: Have that marked for identification.

Mr. Cutler: Could we have this marked, if your Honor please?

The Clerk: Plaintiffs' Exhibit 5.

(The exhibit referred to was marked Plaintiffs' Exhibit 5 for identification.)

(Testimony of Hildegarde Stone.)

Mr. Cutler: Is there any objection to it going into evidence?

The Court: It all should be in evidence. It gives a [98] panoramic view of it.

(The exhibit referred to marked Plaintiffs' Exhibit 5, was recived in evidence.)

The Court: Any further questions?

Mr. Cutler: That is all, your Honor.

Mr. Pollack: Step down. That is all.

Mr. Cutler: We would like a few moments to see if we have the sketch that Mr. Daniels gave to them.

Mr. Pollack: I have a couple of questions I want to ask Mr. Farnell as part of my case.

The Court: You may call him as an adverse witness.

JACK W. S. FARNELL

called as a witness by the defendants under Rule 43(b), having been previously sworn, resumed the stand and testified as follows:

Direct Examination

By Mr. Pollack:

Q. Mr. Farnell, how much would you be willing to sell the property for now just as it stands?

A. I don't think I can answer that question that quickly, Mr. Pollack. This thing is very involved and to ask a question like that I can't give you an honest answer.

Q. Well, you have thought about the value of the

(Testimony of Jack W. S. Farnell.)

property, haven't you, as it is today as compared to what you thought it was when you bought it? [99]

A. I hired an appraiser to determine the value of it, yes.

Q. But I want to know your idea.

A. I have no idea on that, Mr. Pollack, at the moment.

Q. I understand you to say you have no idea at all what the property is worth?

A. The property isn't salable to begin with.

Q. Well, assuming somebody would want to buy it what would you take for the property?

A. The only way I can answer you on that, Mr. Pollack, is that—to not answer your question the way you asked it, I would have to answer it by saying that we paid \$38,000 for it. We acted in good faith and as far as our relationship between us and the Stones is concerned, I think that we did not get the value as it was represented to us.

Q. I understand that but I want to know how much value you think you did get.

A. I have told you I cannot answer the question.

Q. Don't you have any idea at all what that property is worth?

A. I am not an expert, Mr. Pollack.

Q. But you own the property?

A. That is correct, I own a part of it at any rate.

Q. Would you sell it for \$15,000?

A. You mean would I sell the property for \$15,000? [100]

Q. Yes. A. And walk out?

(Testimony of Jack W. S. Farnell.)

Q. Yes.

A. If I did, Mr. Pollack, I would certainly have to have some understanding with the Bank of America to be relieved of the first and the Stones to be relieved of the second because those two today total about \$24,000, the first and second total about \$24,000.

Q. But the value of property is not determined by the amount of encumbrances. You know that, don't you?

A. I am not a realtor and I am not an appraiser.

Q. Are you willing to say one way or the other whether you would sell that property for \$15,000?

Mr. Cutler: I object to that, the witness having indicated that he could not say.

Mr. Pollack: I don't think I am bound by an answer.

The Court: I think he has answered the question. He says he doesn't know.

Q. (By Mr. Pollack): Would you sell it for \$20,000?

A. All I can say, Mr. Pollack, is I don't know. You are posing a question to me which still leaves me liable on the first and second.

Q. Well, would you sell it for \$25,000?

A. If I sold it for \$25,000 and was liable on the first and second plus the \$12,000 or so I have given to the [101] Stones you could see where that would leave me.

Q. Well, you would come out the same regard-

(Testimony of Jack W. S. Farnell.)

less of what the value of the property is. Let me pass on. Would you sell the property for \$25,000?

A. Mr. Pollack, I can't answer your question.

Q. You own the property and you have no idea what it is worth?

A. Yes, I have an idea of what it is worth from what Mr. Baehr has told me.

Q. Well, would you sell it for what Mr. Baehr said?

A. I would not sell it for that, no, because for this reason that I would not be released from the obligation to pay the first and second plus the fact that I have made certain improvements on it and I gave the Stones \$12,000.

Q. How much is the first mortgage?

A. Right today the balance of the first is about \$12,625.

Q. All right. A. And the second is \$10,926.

Q. Now, if Mr. Stone would cancel the second trust deed would you sell it for \$15,000?

A. And the buyer would take over the first?

Q. Yes—well, the bank would be paid out of the first.

A. The bank would be paid out of the \$15,000?

Q. Yes. [102]

A. No, I would not. I don't think it has any more value than that, Mr. Pollack, but I would not.

Q. We are trying to determine what the value is and one way—

The Court: Just a moment. Let me ask what do you figure your damages have been by reason of this unfortunate situation?

(Testimony of Jack W. S. Farnell.)

The Witness: Well, I made an offer to rescind.

The Court: I don't care about that. When did you make the offer?

The Witness: To be made whole. It figured out that the damages were around \$14,000 plus that which I put into the property and assuming that I am relieved of the first and the second trust deeds.

Q. (By Mr. Pollack): Let me ask you just once more. At what price would you sell that property today?

The Court: I am going to sustain the objection on my own motion. I don't think it is material.

Mr. Pollack: Very well.

The Court: Any further questions?

Mr. Pollack: No.

The Court: That is all. Any further evidence?

Mr. Pollack: No, the defense rests. Oh, pardon me, except for the other on the counterclaim, your Honor.

I think it is admitted that the payments weren't made, [103] isn't that true?

Mr. Cutler: The payments were not made? Yes. I admitted in the answer to the counterclaim that you alleged that payments have not been made except—that payments have not been kept up on the second trust deed but they have on the first.

Mr. Pollack: Yes.

Mr. Cutler: Pending this action.

Mr. Pollack: Yes. And that the second trust deed is in default except for the defenses you have alleged.

Mr. Cutler: Yes. We would like permission, if your Honor please, to submit—we do not seem to be able to find the sketch that Mrs. Stone has referred to as being prepared by Mr. Daniels and charged to Mr. Stone. But we would like to produce it and file it here as an exhibit.

Mr. Pollack: I could hardly consent to that. I certainly would want to cross-examine anyone who claims that they have the document. I would want to make sure it was the right document. I couldn't stipulate to the filing of any document at all that I know nothing about.

Mr. Cutler: However, if we could show that to you and we would like to introduce that at the present time, but unfortunately it doesn't seem to be available. Have you looked through everything here, Mr. Farnell?

Mr. Farnell: Yes, and I can't find it. [104]

Mr. Cutler: That sketch must be introduced—it must have been introduced. Could I ask Mr. Stone one question. Perhaps he can tell us who prepared the sketch.

Mr. Pollack: If he knows. I don't think he knows.

Mr. Cutler: Do you know who prepared the sketch that Mr. Daniels ordered?

Mr. Stone: All I can tell you is that a few days after I took possession of the house I received a bill from a strange firm and I refused to pay that bill. That is all I know.

Mr. Cutler: You received the sketch, too, did you?

Mr. Stone: No, I didn't. I received a bill.

Mr. Cutler: Did you receive a sketch at all yourself?

Mr. Stone: Did I see?

Mr. Cutler: Yes.

Mr. Stone: I remember seeing such a sketch, I believe, yes. I seem to remember that.

Mr. Cutler: Does Mrs. Stone remember where she got it?

Mr. Pollack: She said from Mr. Daniels.

Mr. Cutler: He gave it to you?

Mrs. Stone: Yes.

Mr. Cutler: We will attempt to find it and submit it to Mr. Pollack and perhaps on his stipulation it can be filed with the court.

Mr. Pollack: If I am satisfied that that is the one I [105] will be glad to stipulate to it, yes.

Mr. Cutler: Very good.

The Court: Now, gentlemen, pursuant to our conference in chambers, I am going to give counsel time to brief the questions of law, and I am willing to give you sufficient time to find out whether or not there is any chance of getting a clearance from the city so that everybody can be made whole.

I want to say this to both people on both sides. You both look like pretty decent, fine people to me. It looks like there has been an unfortunate mistake made here.

I think that Mr. Stone was probably sold a bill of goods and it is very apparent that the Farnells have been sold a bill of goods. I am not passing on the question of it at this time. I am simply making these

comments on the assumption that they were sold a bill of goods when they bought the property and that there has been a substantial loss here on account of it. As a matter of fairness neither one should bear the entire loss and I think these good people should be able to adjust their differences.

The evidence here indicates that the city may some time in the future require this property and they may not, but in any event at the present time it certainly is an unsalable piece of property and it would have been unsalable when the Stones sold it if the true facts had been known. [106]

As a matter of fact they wouldn't have bought it, probably, if they had known the true facts. Just because somebody passes off a counterfeit dollar bill on you doesn't justify you passing it off on somebody else.

It seems to me that as a matter of fairness and justice between people that they shouldn't have to resort to a final decision by this court. Notwithstanding the differences of opinion of the lawyers I think the law is pretty well settled under such circumstances, but it seems to me that the Farnells, having their place and having you might say their pie, and the possibilities are that they are going to be able to enjoy their property if they want to continue living there for an indefinite length of time, and eventually they may be able to make an adjustment with the city.

It seems to me rather unfair that the Stones should bear the entire loss. I think there should be

some adjustment between the parties. I think they should treat each other as they would like to be treated rather than to have the court make a cold, hard decision.

I am able to and I am not afraid to. These look like good people and they ought to be able to sit down and try to adjust their differences.

I realize that the Stones live in New York, a long distance away, and they probably want to have this a closed incident. They have an interest or an investment in this [107] property, the second trust deed, and they don't want to be coming out here and having further litigation. I don't suppose at this time of the year you enjoyed the trip across the continent unless you happened to be traveling in an air-conditioned Cadillac. But what I have understood from counsel the defendants in this case have enjoyed their home and would like to have their home and apparently have a nice, delightful spot. They would probably a great deal rather live there than they would in New York. I have been in both places this spring and I think I would rather live out on Mulholland Drive than in New York.

There has been some conflict in the testimony but I don't think it is very serious.

When you had the property surveyed you felt that you had not gotten all you thought you were getting and when you people found that out you felt that you had sold everything that you had gotten—you were selling the same thing, but there is undoubtedly a loss here that somebody is going to have to bear.

It seems to me as a matter of justice, taking the chances of what is going to happen in the future, you ought to be able to make some adjustment and I am going to give counsel an opportunity to make such an attempt.

The case will be submitted on 20, 20 and 20 and if there is any likelihood of your being able to make an adjustment [108] with the city or between themselves, between the parties, I will consider an application for the reopening of the case to take further evidence on the element of damages, but unless there is something definite, some definite arrangements made with the city I will just have to decide it. But I do hope that you people—and when I say “good people” I think you are both good people—both of you got into an unfortunate situation and both of you are going to have to bear, no matter what the outcome is, you are going to have to bear part of the loss and it seems to me there is no use of either one of you getting on your so-called high horse about it.

Just try to be fair with one another and see if you can’t adjust it.

Don’t you think you can among yourselves keep these lawyers out of it. These lawyers want to fight all the time. Just see if you can’t make an adjustment. However, if you want the court to decide it the court will decide it. All you have to do is say the word and I will decide it and let the chips fall where they may. But I think you will be happier if you will settle it among yourselves.

I would like to see you people go out and have

dinner together tonight and see if you can't forget about it and when you feel in a good nature talk it over rather than after sitting here in the courtroom call each other names, more or [109] less indirectly.

We will submit it that way. I think it will be much finer if you people can make your own adjustment rather than have the court do it.

I practiced law for 25 years and I know what it means to get up on your high horse and fight and say "I have a right to have this and that and everything else," but when you get through we don't always get it. One of the lawyers in this case is going to be wrong—eventually is going to be held wrong in his conclusions, and I think the old adage "A poor compromise is better than a good lawsuit" still holds true.

Try to find some place to get out of the smog long enough to talk this over and thresh it out among yourselves.

I understand there has been some effort in that respect. At least I suggested that to counsel the other day, but so far as I know, no results so far have been accomplished.

I have always found that you should never quit. There is always a possibility of a settlement. There hasn't been any bitterness shown in this case. Nobody seems to be mad at each other. Even the lawyers are not very mad at each other. They get paid for being mad. As far as the individuals are concerned they seem to be pretty good natured.

I feel that all four of them would like to live and let [110] live and it seems to me that when they are

here together instead of trying to settle things 3,000 miles apart by correspondence there should be an attempt made toward a settlement.

It would be easy for me to decide but I think it would be far more satisfactory if the people would decide it among themselves.

The Clerk: There is an additional defendant in the counterclaim, your Honor.

The Court: What are you going to do with the Bank of America claim?

Mr. Pollack: Unfortunately we are back at that again. Has your Honor read the authorities I submitted?

The Court: I have made up my mind as to that, counsel. If you are not going to dismiss I will remand it to the State Court. I should have told you that this morning. I don't want to send you back there with these people 3,000 miles away.

If I had caught this weeks ago I would have remanded it to the State Court and that would mean probably three or four years before you would get to trial. When I found these people were on their way from New York it was too late to stop them.

I told you that if you would dismiss as to the Bank of America it would clear things up. They haven't even appeared. [111] They are only named as trustee. I realize they may be concerned only as a nominal party but there is no occasion for the court to take a risk on the question of jurisdiction.

So, you are going to have to make up your mind as to whether you are going to dismiss as to the

Bank of America. And you will have to make it up quickly, too.

Mr. Pollack: How quick?

The Court: About three weeks.

Mr. Pollack: That is awfully quick.

The Court: Well, it isn't too quick because I talked to you about it the other day.

Mr. Pollack: May I have just a moment to talk to my client?

The Court: The testimony here is that the payments on that trust deed are up to date. They are the trustees on the second mortgage?

Mr. Pollack: Yes. I think they are the beneficiary of the first trust deed.

The Court: I want this understanding with counsel, that in taking this under submission these people are to have an opportunity to see if there is any possibility of settling this matter. I want an understanding that there will be no further steps taken in this matter until this case is concluded.

Mr. Pollack: There is no intention of pressing that at [112] all until after this case is concluded.

The Court: I just want that definitely understood. You will have to get the California corporation out of the case.

Mr. Pollack: I will dismiss as to the Bank of America.

The Court: All right. It will be submitted, as I said, 20, 20 and 20.

Mr. Cutler: 20 days for the plaintiff?

The Court: There is only one question of law in this case, gentlemen, where you differ substantially

apparently from our discussions in chambers, and that is whether there has to be a definite intent proven on the part of the Stones. The contention on the other side is that whether they knew the boundaries are not they are presumed to know them. Now, that is the only difference and that is the only point you need to cover. It isn't going to be a difficult thing. I am giving you plenty of time to afford the attorneys an opportunity to see if they can do anything with the situation.

I understand that this property is lower than the street there.

Mr. Stone: Yes.

Mr. Farnell: Yes.

The Court: And the highway is built up above the property.

Mr. Cutler: That is correct, your Honor.

The Court: So it isn't going to hurt the highway any [113] if there is some deviation.

Mr. Pollack: Not a bit.

The Court: The only thing is a question of getting action by the city. These people are entitled to a merchantable title to that property just the same as the plaintiffs in this case are entitled to a merchantable title which they thought they had.

Mr. Pollack: Very well.

The Court: This is one of those unfortunate situations. It is too bad it has to reach court and I am stretching this out a little bit, as far as briefs are concerned, in the hope that while you people are enjoying our California smog you might be able to

think of something else and see if you can't adjust your differences.

There is such a thing as fair play and I think it is going to take fair play on both sides. You can't settle a case by one side getting everything and the other side nothing. Each one has to make concessions to clean a case up. That is just one of the things that happens in a compromise. A compromise to my way of thinking means that one party really loses something by a compromise because if he had won the case he wouldn't have had to make that concession. But how does he know who is going to win? You might have this property tied up in litigation for three or four years. Life is too short. As I said before, I think you all look like [114] good people here and you ought to be able to get along and work this out. And if you are able to enjoy the beautiful view up there your mind ought to be clear and clean and you ought to be willing to do what you think is fair to one another. Won't you try it. Otherwise I will decide it. I won't have any trouble. It is going to hurt somebody.

Mr. Cutler: Thank you, sir.

(Whereupon, at 3:30 o'clock p.m. the above-entitled matter was concluded.) [115]

Certificate

I, J. D. Ambrose, hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 22nd day of Jan., 1956.

/s/ J. D. AMBROSE,
Official Reporter.

[Endorsed] Filed January 23, 1956.

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 77, inclusive, contain the original

Petition for Removal;

Affidavit of Giving Notice of Filing Petition for Removal;

Notice of Removal;

Statement in Opposition to Motion to Quash Summons, etc.;

Withdrawal of Motion to Quash;

Notice of Motion to Join Additional Party on Counterclaim;

Demand for Jury Trial;

Answer and Counterclaim;

[Endorsed]: No. 15024. United States Court of Appeals for the Ninth Circuit. George Wesley Stone and Hildegarde Stone, Appellants, vs. Jack W. S. Farnell and Elisabeth Pattee Farnell, Appellees. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed February 3, 1956.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the
Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 15024

GEORGE WESLEY STONE and HILDEGARDE
STONE,

Appellants,

vs.

JACK W. S. FARNELL and ELISABETH PAT-
TEE FARNELL,

Appellees.

STATEMENT OF POINTS ON APPEAL ON
WHICH APPELLANTS INTEND TO RELY

The following are the points on which the appellants intend to rely on their appeal in the within proceeding:

1. The Findings of Fact are incorrect and erroneous and are not supported by the evidence.
2. The Conclusions of Law are incorrect and erroneous and are not supported by the Findings of Fact.
3. The judgment in favor of appellees and against appellants for damages in the sum of Fifteen Thousand (\$15,000.00) Dollars, and for cancellation of the promissory note and second trust deed given to secure the same, referred to in the counterclaim, is contrary to the law and the evidence.
4. Neither the evidence nor the Findings of Fact sustain paragraph I of the Conclusions of Law that

in making the sale of the real property referred to, appellants committed both constructive and actual fraud under California law.

5. Neither the evidence nor the Findings of Fact sustain paragraph II of the Conclusions of Law that appellees have a right to sue for damages.

6. Neither the evidence nor the Findings of Fact sustain paragraph III of the Conclusions of Law that appellants are not entitled to foreclose the trust deed set out in their counterclaim, and that said trust deed and the note secured thereby should be cancelled.

7. Neither the evidence nor the Findings of Fact sustain paragraph IV of the Conclusions of Law that appellees are entitled to judgment in the sum of Fifteen Thousand (\$15,000.00) Dollars, and their costs incurred or expended.

8. The evidence does not sustain the allegations of fraud, either actual or constructive, as alleged in the complaint.

9. The evidence at best shows mistake on the part of appellants; allegations of fraud cannot be sustained by proof of mistake.

10. There is no finding of scienter or knowledge on the part of appellants. A finding that a representation was false without a finding of the presence of knowledge or scienter is not sufficient to sustain the conclusion of fraud.

11. The failure of the court to find on the issue of knowledge or scienter is reversible error.

12. There is no finding as to the value of the property received by appellees. Such a finding is essential in order to determine the amount of damages, if any, sustained by appellees, and the failure to make a finding thereon is reversible error.

13. The complaint in this action is one at law to recover damages based upon certain representations alleged to have been fraudulently made by appellants. It is not an action in equity for rescission. There is no evidence of knowledge of the falsity, or of intent to deceive. The evidence shows at most that the misrepresentations, if any, were honestly and innocently made. Assuming that appellants might have been liable in an action for rescission under these circumstances, they are not liable in an action at law for damages for misrepresentations honestly and innocently made without intent to deceive.

Dated: February 6, 1956.

/s/ LEO SHAPIRO,

Attorney for Appellants.

Affidavit of service by mail attached.

[Endorsed]: Filed February 7, 1956.

No. 15024

In the
United States Court of Appeals
For the Ninth Circuit

GEORGE WESLEY STONE and HIL-
DEGARDE W. STONE,

Appellants,

vs.

JACK W. S. FARNELL and ELISA-
BETH PATTEE FARNELL,

Appellees.

Appeal From the United States District Court for the
Southern District of California, Central Division.

Appellants' Brief

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FILED

JUN 21 1956



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In the
United States Court of Appeals
For the Ninth Circuit

GEORGE WESLEY STONE and HIL-
DEGARDE W. STONE,

Appellants,

vs.

JACK W. S. FARNELL and ELISA-
BETH PATTEE FARNELL,

Appellees.

No.
No. 15024

Appellants' Brief

JURISDICTION

This case is before the Court upon an appeal taken by George Wesley Stone and Hildegarde W. Stone from a judgment of the United States District Court for the Southern District of California, Central Division, docketed and entered on November 29, 1955, awarding appellees damages against appellants in the sum of \$15,000; denying appellants recovery on their counterclaim for foreclosure as a mortgage of the deed of trust described in said counterclaim; and ordering

the cancellation of the said deed of trust. This Court has jurisdiction of this appeal. (28 U.S.C. Sec. 1291.)

STATEMENT OF THE PLEADINGS

The proceedings were initiated by a complaint filed by appellees in the Superior Court of the State of California in and for the County of Los Angeles on the 14th day of January, 1955. The complaint alleges that appellees, in reliance upon certain representations alleged to have been falsely and fraudulently made by appellants, purchased the real property described in the complaint for the sum of \$38,000; that said property was not as represented and was actually worth no more than \$18,000. The relief sought was the recovery of damages in the sum of \$20,000, and the cancellation of a promissory note and second deed of trust given as part of the purchase price. The proceedings were removed to the United States District Court for the Southern District of California, Central Division, upon a petition for removal filed by appellants. The petition alleged that appellants were citizens and residents of the State of New York, and not citizens or residents of the State of California; that the plaintiffs in said action were citizens and residents of the State of California; that said action involved a controversy wholly between citizens of different states, in an amount in excess of \$3,000, and by reason of which facts the United States District Court had exclusive jurisdiction. (28 U.S.C. sec. 1332.) The petition for removal is found at page 3 of the Transcript of Rec-

ord; a copy of the complaint filed in the Superior Court of the State of California is attached as Exhibit "A" to said petition. (Transcript of Record, p. 8.)

Upon the removal of the proceedings to the United States District Court, appellants filed their answer to the complaint, denying that they had made any false or fraudulent representations in connection with the sale referred to, and by way of counterclaim alleged that plaintiffs in said action had defaulted in the payment of the monthly installments of principal and interest under a second deed of trust executed by them to secure the payment of part of the purchase price of said property; appellants by said counterclaim sought to foreclose the said deed of trust as a mortgage. The answer and counterclaim is set forth commencing at page 25 of the Transcript of Record. Appellees filed their answer to the counterclaim, in which they admitted that monthly payments on the said deed of trust had not been made from and after February 5, 1955, and alleged as justification for said non-payment the matters referred to in the second cause of action of their complaint. (Transcript of Record, p. 37.) Although Bank of America was named as an additional defendant on said counterclaim, at the conclusion of the trial appellants dismissed in open court as to said defendant. (Transcript of Record, p. 156.)

STATEMENT OF THE CASE

The evidence shows that appellees agreed to buy, and appellants agreed to sell, for a total consideration of \$38,000, the property described in paragraph I of the complaint, located at 13751 Mulholland Drive, Los Angeles, California, consisting of the main residence, guest house, carport, cesspool and septic tank, swimming pool, walks, driveway, landscaping and other appurtenances. Approximately seven or eight months after the consummation of the sale, and as a result of a survey made by appellees, the parties learned for the first time that approximately one-third of the main residence, the carport, the guesthouse, the cesspool and septic tank, and portions of the walks, driveways and landscaping, and other appurtenances, were not on the property as described in paragraph I of the complaint, and that the said improvements were located on property belonging to the City of Los Angeles as part of Mulholland Drive. Appellees did not rescind the transaction or give notice of rescission thereof, but instead commenced their action for the recovery of damages.

Jack W. S. Farnell testified that Mrs. Stone pointed out the boundaries of the property, (Transcript of Record, p. 114), and told him that all the improvements were on the property. (Transcript of Record, p. 115). He admitted that he had no conversations with Mr. Stone. (Transcript of Record, p. 115). Mrs. Farnell's testimony was substantially to the same effect. Transcript of Record, p. 128).

P. D. Baehr, an appraiser, testified that the market value of the property as it actually existed, was \$10,600. (Transcript of Record, p. 79).

Henry Bernasconi, a house mover, testified that the cost of moving the main house on to the property would be \$7,400, and that the cost of moving the guest house would be \$3,380. (Transcript of Record, pp. 94 and 95). There was no other evidence of damage.

Mr. Stone testified, in response to questioning by Judge Harrison, that he bought the property on September 15, 1952; that when he bought it he assumed that all of the improvements were on the property, and that when he sold it he likewise assumed that all of the improvements were on the land. (Transcript of Record, pp. 132 and 133). He testified that he had no information to the contrary until after Mr. Farnell had the survey made, (Transcript of Record, p. 132), which, as previously stated, was some seven or eight months after the sale was completed. He testified further that while he owned the property a fire occurred which destroyed about 80% of the house; that he collected approximately \$15,100 in insurance, and rebuilt the house on its original foundation at a cost in excess of \$26,000. (Transcript of Record, p. 132).

Mrs. Stone testified that prior to the sale, and when Mrs. Farnell was looking over the property, she gave Mrs. Farnell a map or sketch which she had obtained from Keith Daniels, from whom the Stones purchased the property. (Transcript of Record, p. 138). This map or sketch showed that all of the improvements

were on the property except two feet of the carport, which to that extent encroached on Mulholland Drive. This was not denied by Mrs. Farnell. Mrs. Stone denied that she had any discussions or conversations with the Farnells regarding the location of the improvements on the lot except as above stated. She testified that she had no other information regarding the location of the south boundary other than the map or sketch given to her by Mr. Daniels, the former owner. The Farnells made no protest or comment concerning the fact that the map showed that two feet of the carport was on city property. (Transcript of Record, p. 142). The map or sketch referred to by Mrs. Stone, given by her to Mrs. Farnell, was not produced by the Farnells and was not offered in evidence. Mr. Farnell admitted receiving the map. (Transcript of Record, p. 122).

It was stipulated in open court that the Farnells had not made the payments on the second trust deed. (Transcript of Record, p. 148).

THE QUESTIONS INVOLVED

I.

In an action at law for damages for fraud and deceit based upon representations alleged to have been falsely and fraudulently made, as distinguished from an action in equity for rescission, there being no evidence of actual knowledge on the part of appellants that the representations were false and untrue, are appellees entitled to judgment for damages in the absence of proof that appellants had no reasonable ground for believing the representations to be true?

II.

Where the evidence shows that the representations made by appellants as to the boundaries and location of improvements on the property were based upon a map or sketch and other information obtained by them from their vendor, and where this evidence is uncontradicted, does not this establish as a matter of law that appellants had reasonable ground for believing the representations made by them to be true?

III.

Where the complaint charges appellants with the making of false and fraudulent representations in order to induce appellees to purchase their property, and it was stipulated that a mistake was made as to the boundaries of the property and the location of the improvements, are the allegations of fraud sustained by proof of mistake?

IV.

Where appellees, prior to the purchase of the property, were given a map showing that two feet of the carport encroached on city property, and this fact is not denied, was this not notice to appellees sufficient to put them on inquiry as to the true boundary line and the location of the improvements, and were they not thereby estopped from relying upon the representations alleged to have been made by appellants?

V

Is the Conclusion of Law that appellants committed both constructive and actual fraud supported by the Findings of Fact when there is no finding that the representations made by appellants were either known by them to be untrue, or made in a manner not warranted by their information?

VI.

In the absence of a finding of the value of the property actually received by appellees, is there any basis or support for the Conclusion of Law that appellees are entitled to judgment for \$15,000?

VII.

In the absence of Findings of Fact upon the following material issues:

- (1) Were the representations made by appellants with knowledge of their falsity?

- (2) Were the representations made by appellants in a manner not warranted by their information, or recklessly and carelessly and without an honest belief in their truth?
- (3) Were the statements and representations alleged to have been made by appellants, as set forth in paragraph III, subparagraphs 1, 2 and 3 of the complaint, fraudulently made as alleged in paragraph IV of the complaint?
- (4) Did appellants fraudulently represent to appellees that all of the improvements were on their land, as alleged in paragraph X of the complaint?
- (5) Did appellants fraudulently represent to appellees that the property being sold to them was well worth the purchase price of \$38,000, as alleged in paragraph XI of the complaint?

is there any support or basis for the Court's Conclusions of Law that appellants committed both constructive and actual fraud under California law, and that appellees are entitled to judgment against appellants, as stated in the Conclusions of Law?

VIII.

Upon the evidence in the record, are appellants entitled to judgment against appellees upon their counterclaim and should the judgment appealed from be reversed with instructions to the court below to enter judgment in favor of appellants for the foreclosure as a mortgage of the deed of trust referred to in their counterclaim, in accordance with the prayer thereof?

SPECIFICATION OF ERRORS UPON WHICH APPELLANTS RELY

I.

Paragraph I of the Conclusions of Law that appellants committed both actual and constructive fraud under California law is not supported by the evidence.

- (a) There is no evidence of actual knowledge on the part of appellants that the representations alleged to have been made by them were false and untrue.
- (b) There is no evidence that appellants had no reasonable ground for believing the representations to be true.

Proof of either (a) or (b), i.e. scienter, is essential in an action for damages for fraud and deceit.

- (c) The representations made by appellants were based upon a map and information obtained by them from their vendor, which they believed to be true, and upon which they relied; this establishes reasonable grounds for their belief in the truth of the representations as a matter of law.

II.

Paragraph I of the Conclusions of Law that appellants committed both actual and constructive fraud under California law is not supported by proof of mistake.

- (a) There is no evidence of fraud, either actual or constructive.
- (b) It was stipulated that there was a mistake as to the boundaries; this is not the equivalent of fraud.

III.

Paragraph I of the Conclusions of Law that appellants committed both actual and constructive fraud under California law is not supported by the Findings of Fact.

- (a) There is no Finding of Fact that:
 - 1. The representations were made by appellants with knowledge of their falsity, or
 - 2. In a manner not warranted by their information, or
 - 3. Recklessly or carelessly, and without an honest belief in their truth.
- (b) There is no Finding of Fact that the statements and representations alleged to have been made by appellants, as set forth in paragraph III, subparagraphs 1, 2 and 3 of the second cause of action of the complaint, were fraudulently made.
- (c) There is no Finding of Fact that appellants fraudulently represented that all of the improvements were on their land, and that good and valid title thereto was transferred to plaintiffs, as alleged in paragraph X of the second cause of action of the complaint.

- (d) There is no Finding of Fact that appellants fraudulently represented that the property being sold was worth the purchase price of \$38,000, as alleged in paragraph XI of the second cause of the action of the complaint.

The failure to find upon each of these issues is reversible error.

IV.

Paragraph II of the Conclusions of Law that appellees have a right to sue for damages is not supported by the evidence or the Findings of Fact.

- (a) For the reasons assigned in the foregoing specifications appellees have not established a cause of action against appellants, and the judgment in favor of appellees against appellants is contrary to the law and the evidence, and can not be sustained.

V.

Paragraph III of the Conclusions of Law that appellants are not entitled to foreclose the deed of trust set out in their counterclaim, and that said deed of trust and the note secured thereby should be cancelled, is not supported by the evidence or the Findings of Fact.

- (a) The note and deed of trust are admittedly in default, and the Court erred in denying appellants judgment on their counterclaim.

VI.

Paragraph IV of the Conclusions of Law that appellees are entitled to judgment in the sum of \$15,000 is not supported by the evidence or the Findings of Fact.

- (a) There is no Finding of Fact as to the value of the property actually received by appellees. This is essential in order to determine the difference between the price paid and the value of the property received, which is the measure of damages under the "out of pocket" rule.
- (b) There is no evidence as to the value of the furniture in the guest house included in the purchase.

The failure to find on these issues is reversible error.

VII.

That portion of paragraph IV of the Findings of Fact that it is untrue that the land as it actually existed was worth \$38,000 is not supported by the evidence.

VIII.

That portion of paragraph V of the Findings of Fact that it is true that appellees relied upon appellants' representations is not supported by the evidence.

- (a) Appellees had notice sufficient to put them on inquiry as to the boundaries and location of the improvements by a map showing the true

boundaries and location of the improvements, and were estopped from relying upon the representations alleged to have been made.

IX.

Paragraph VII of the Findings of Fact, in which it is implied that appellees did not have knowledge of the boundaries and the location of the improvements, is not supported by the evidence.

- (a) The evidence shows that appellees had notice sufficient to put them on inquiry as to the boundaries and location of the improvements as stated in VIII (a) hereof.

X.

Paragraph VIII of the Findings of Fact, that it is true that as a direct and proximate result of appellants' misrepresentation appellees were damaged in the sum of \$15,000, is not supported by the evidence.

- (a) For the reasons assigned in the foregoing specifications the misrepresentations alleged to have been made by appellants, are not actionable and appellees have not been damaged.

ARGUMENT

I.

There Is No Evidence in the Record That Appellants Had Either Actual Knowledge of the Untruth of the Statements Made by Them, or That They Lacked an Honest Belief in Their Truth, or That They Were Made in a manner not Warranted by Their Information; Nor Is There a Finding That Appellants Had Either Actual Knowledge of the Untruth of the Statments, or That They Lacked an Honest Belief in Their Truth, or That They Were Made in a Manner Not Warranted by Their Information. In the Absence of Such Evidence and of a Finding Thereon, the Judgment Against Appellants Can Not Be Sustained.

It should be borne in mind that this is an action at law for damages based upon the alleged fraud of appellants, as distinguished from an action in equity for rescission. It is well established that the plaintiff in an action for fraud or deceit based upon misrepresentation must show that the representation was false and known to be false by the party making it, or else made recklessly or without reasonable grounds for believing its truth.

23 Cal. Jur., 2d, 27, §11.

The elements of actionable fraud and deceit have been codified in California. Actual fraud is defined by §1572 of the California Civil Code as an act committed by a party to a contract with intent to deceive such other party, or to induce him to enter into the contract, which is either:

“1. The suggestion, as a fact, of that which is not true, by one who does not believe it to be true;

“2. The positive assertion, *in a manner not warranted by the information of the person making it*, of that which is not true, though he believes it to be true;” (Emphasis supplied).

Section 1710 of the California Civil Code defines deceit as either:

“1. The suggestion, as a fact, of that which is not true, by one who does not believe it to be true;

“2. The assertion, as a fact, of that which is not true, *by one who has no reasonable ground for believing it to be true; . . .*” (Emphasis supplied).

Thus either actual knowledge or the assertion as a fact in a manner not warranted by the information is the gist of the action.

The rule is stated in *1 Black on Rescission and Cancellation* (Second Edition) 313, §106, as follows:

“An action at law for fraud or deceit cannot be maintained unless a guilty knowledge, actual or constructive, is established, either by showing that the representation was false within the knowledge of the person making it, or that he made it as a positive assertion calculated to convey the impression that he had actual knowledge of its truth when he was conscious that he had no such knowledge, or that the statement was made recklessly and without knowing or caring whether it were true or false. For fraud implies the doing of a wrong willfully; and hence an innocent mis-

representation made through mistake without knowledge of its falsity, or which is honestly believed to be true, and made with no intention to deceive, is not actionable fraud."

The rule is similarly stated in *23 Cal. Jur.* 2d, 64, §26:

"A necessary element of actual fraud is the intent to deceive or the intent to induce one to enter into a transaction. Furthermore, a fraudulent misrepresentation, to be actionable, must be made with knowledge that it is or may be untrue. Ordinarily, therefore, fraud can not be predicated on statements made by one who believes in, and has no reason to doubt their truth."

Since jurisdiction in this case is based solely on diversity of citizenship, the California substantive law controls. *Erie Railroad Co. v. Tompkins*, 1938, 304 U. S. 64.

It is well established by the California cases that the plaintiff in an action for damages for fraud must plead and prove, and the Court must find, a false representation of a material fact made with knowledge of its falsity, or in a manner not warranted by the information available to the defendant. *Wishnick v. Frye*, 111 Cal. App. 2d, 926, [245 Pacific 2d 532], is one of the more recent California cases establishing this rule. There the plaintiff brought an action to recover damages for fraud and deceit, and recovered judgment for \$14,180.00. The judgment was reversed on appeal. At page 930 of 111 Cal. App. 2d, the Court states:

“Of the several points urged by appellant in attacking the judgment, we believe that a consideration of his argument that the judgment cannot be sustained in view of the absence of a finding of scienter suffices to dispose of this appeal. The elements of actionable fraud, which must be pleaded and proved if a plaintiff is to prevail, consist of a false representation of a material fact, made with knowledge of its falsity and with the intent to induce reliance thereon, upon which plaintiff justifiably relies to his injury. (*Blackman v. Howes*, 82 Cal. App. 2d 275 [185 P. 2d 1019, 174 A.L.R. 1004]; *Podlasky v. Price*, 87 Cal. App. 2d 151, 158 [196 P. 2d 608].) *The omission of a single one of these elements in an action for deceit will normally prevent recovery.* (*Gonsalves v. Hodgson*, 38 Cal. 2d 91 at p. 100 [237 P. 2d 656]; *Cox v. Westling*, 96 Cal. App. 2d 225, 229 [215 P. 2d 52].) In order to satisfy the requirement of scienter, it may be established either that defendant had actual knowledge of the untruth of his statements, or that he lacked an honest belief in their truth, or that the statements were carelessly and recklessly made, in a manner not warranted by the information available to defendant. (*Gonsalves v. Hodgson*, *supra*; 12 Cal. Jur. 724-725; Restatement of Torts, §526.) *In whatever fashion scienter or knowledge on the part of the defendant is adduced from the evidence, it constitutes a vital element of plaintiff's cause of action, and must affirmatively appear in the findings to support a judgment for fraud.* (*Hoffman v. Kirby*, 136 Cal. 26, 29 [68 P. 321]; *Harding v. Robinson*, 175 Cal. 534, 539 [166 P. 808]; *Hall v. Mitchell*, 59 Cal.

App. 743, 748 [211 P. 853]. See, also, *Boas v. Bank of America*, 51 Cal. App. 2d 592, 599 [125 P. 2d 620].) (Emphasis supplied).

“In applying these rules to the finding which we have quoted, it becomes apparent that it is fatally deficient in its omission to find that defendant made the representation on which the judgment is founded either with knowledge of its falsity, or without a reasonable belief in its truth, or in a manner not warranted by the facts used as a basis for his statements. Although under certain circumstances one of the elements of fraud may be implied from certain other specific findings, as where the law may supply the intent to deceive from the fact that one has knowingly made false representations (*Boas v. Bank of American, supra*, p. 598) or where the materiality of a representation may be implied from the circumstances of plaintiff's reliance thereon (*Springer v. Angeles Credit Co.*, 44 Cal. App. 2d 712 [113 P. 2d 7]), *the mere finding that a representation of fact is false without a finding of the presence of the requisite element of scienter cannot sustain the conclusion of fraud in an action for damages based on deceit.* (*Hoffman v. Kirby, supra*; *Williams v. Spazier*, 134 Cal. App. 340, 345-348 [25 P. 2d 851], citing Civil Code §§1709, 1710.)” (Emphasis supplied.)

In *Hoffman v. Kirby*, 136 Cal. 26 [68 P. 321], cited in the *Wishnick* case, the facts were strikingly similar to those in the case at bar. In that case defendant represented to plaintiff that a certain tract of land in-

cluded two parcels consisting of approximately twenty acres. It subsequently developed that this acreage did not belong to the defendant. The complaint was for damages and alleged that plaintiff was induced to purchase the property by representations which defendant knew to be false, and which were made with the intent to deceive the plaintiff. As pointed out in the opinion of the Court at page 29 of 136 Cal., there was no finding that defendant knew the representations made by her were untrue, nor was there a finding that she had no reasonable ground for believing them to be true. The Court stated that in this state of the record

“ . . . the result is therefore the same as though the complaint were insufficient to show fraud or deceit.”

The judgment in favor of plaintiff was reversed.

In *Gonsalves v. Hodgson*, 38 Cal. (2d) 91 [237 P. 2d 656], cited in *Wishnick v. Frye*, *supra*, at page 100 of 38 Cal. 2d, the Court says:

“In an action for damages for deceit, the fraudulent representation relied upon must be as to a material fact which is false and known to be false by the maker, or is recklessly made or made without reasonable grounds for believing its truth. It must be made with intent to induce action by the other party and it must have been relied upon by the other party with justification. It must result in damage or injury to the party so relying. *The absence of any one of these elements will preclude recovery.* (*Barron Estate Co. v. Woodruff*

Co., 163 Cal. 561 [126 P. 351, 42 L.R.A.N.S. 125]; Civ. Code, §1709; 12 Cal. Jur. 724; Restatement of Torts, §525.)'' (Emphasis ours.)

Thus, the rule is established that whether the defendant's fraud is based upon actual knowledge of the untruth of his statements, or upon the fact that they were made in a manner not warranted by his information, this knowledge or scienter, is a vital element of the plaintiff's cause of action, and must affirmatively appear in the findings to support a judgment for fraud. The absence of such a finding is fatal. Measured by this requirement, let us now examine the record.

Paragraph III of the second cause of action of the complaint (all references to the complaint are to the second cause of action thereof) alleges that defendants made the representations complained of. (Transcript of Record, p. 10). Paragraph IV alleges that the representations were false and fraudulent when made, and were either known to be false or fraudulent when made; or that they were made in a manner not warranted by defendants' information. (Transcript of Record, p. 11). Paragraph IX alleges the falsity of the representations. (Transcript of Record, p. 13). Paragraph X alleges that the defendants knew that the representations were false when made. (Transcript of Record, p. 14). Paragraph XI alleges that the defendants falsely and fraudulently represented the property to plaintiffs as being worth \$38,000, when in truth and in fact it was worth not more than \$18,000. (Transcript of Record, p. 14).

Knowledge or scienter on the part of defendants is therefore pleaded in paragraphs IV, X and XI, and issue was joined on these particular matters by the denials pleaded in paragraphs I, III and IV of the answer to the second cause of action. (Transcript of Record, p. 26). Passing for the moment the fact that there is no evidence in the record to support a finding that the representations were either made with knowledge of their falsity or in a manner not warranted by the information available to appellants (as will be presently pointed out), let us see if the trial court has anywhere made a finding that the representations were made either with knowledge of their falsity or in a manner not warranted by the information available to the defendants.

Paragraph III of the Findings of Fact (Transcript of Record, p. 50) alleges that it is true that the defendants made the representations as outlined in paragraph III of the complaint. Paragraph IV of the Findings of Fact (Transcript of Record, p. 53) alleges that it is not true that all of the improvements were on the property, and that it is true that the boundaries of the land were such as to leave one-third of the main residence, all of the carport, the guest house and a proportionate amount of the real property entirely off the defendants' land, and on Mulholland Drive, owned by the City of Los Angeles, and that it is untrue that the land as it actually existed was worth \$38,000. Paragraph VI of the Findings of Fact (Transcript of Record, p. 53) also finds that it is true that one-third of

the main residence, the carport, guest house, the entrance driveway and other appurtenances were not included within the boundaries of the property. *There is no finding respecting the matters alleged in paragraphs IV, X and XI of the complaint.* The court made no finding either that appellants had actual knowledge of the untruth of the representations, or that they lacked an honest belief in their truth, or that they were carelessly and recklessly made in a manner not warranted by the information available to them. We are therefore governed by the rule as stated in *Wishnick v. Frye, supra*, at page 930, as follows:

“In order to satisfy the requirement of scienter, it may be established either that defendant had actual knowledge of the untruth of his statements, or that he lacked an honest belief in their truth, or that the statements were carelessly and recklessly made, in a manner not warranted by the information available to defendant. (*Gonsalves v. Hodgson, supra*; 12 Cal. Jur. 724-725; Restatement of Torts, §526.) *In whatever fashion scienter or knowledge on the part of the defendant is adduced from the evidence, it constitutes a vital element of plaintiff's cause of action, and must affirmatively appear in the findings to support a judgment for fraud.* (*Hoffman v. Kirby*, 136 Cal. 26, 29 [68 P. 321]; *Harding v. Robinson*, 175 Cal. 534, 539 [166 P. 808]; *Hall v. Mitchell*, 59 Cal. App. 743, 748 [211 P. 853]. See, also, *Boas v. Bank of America*, 51 Cal. App. 2d 592, 599 [125 P. 2d 620].)

“In applying these rules to the finding which we have quoted, it becomes apparent that it is fatally

deficient in its omission to find that defendant made the representation on which the judgment is founded either with knowledge of its falsity, or without a reasonable belief in its truth, or in a manner not warranted by the facts used as a basis for his statements.” (Emphasis supplied.)

And as stated in *Hoffman v. Kirby, supra*, at page 29 in the absence of such findings “the result is therefore the same as though the complaint were insufficient to show fraud or deceit.”

It is respectfully submitted that upon this ground alone, namely, that the Court failed to make a finding on the matter of scienter or knowledge on the part of appellants, that the judgment must be reversed.

II.

There Is No Evidence in the Record That Appellants Had Actual Knowledge of the Untruth of the Representations, or That They Were Made in a Manner Not Warranted by Their Information.

Upon the evidence in the record the trial court could not properly have found either that appellants had actual knowledge of the untruth of their statements, or that they lacked an honest belief in their truth, or that the statements were carelessly and recklessly made, in a manner not warranted by the information available to them.

There is no evidence in the record, and we are confident that appellees will not contend otherwise, that

appellants had actual knowledge of the fact that a portion of the main residence, the carport, guest house, cesspool and septic tank, and portions of the walks and driveways and of the landscaping and other appurtenances were not included within the boundaries of the property sold. The judgment can therefore not be sustained unless there is evidence that the representations made by appellants concerning the boundaries and the location of the improvements thereon were carelessly and recklessly made in a manner not warranted by their information. (*Wishnick v. Frye, supra*; C. C. 1710, subdivision 2; C. C. 1572, subdivision 2). But even this contention can not be sustained. On the contrary, the only evidence in the record is that appellants were told by Keith Daniels, at the time they purchased the property from him, that the improvements were within the boundaries of the property, that they believed this and had no information to the contrary. This was elicited by the questions put to Mr. Stone by Judge Harrison as follows:

Transcript of Record, page 132:

“THE COURT: When did you buy this property?

“THE WITNESS: September 15, 1952, I believe it was 1952.

“THE COURT: And when you bought it you assumed that all the improvements were on the property or the land that you have bought, didn't you?

“THE WITNESS: I certainly did.

“THE COURT: And that was the same land and same improvements that you sold to the Farnells?

“THE WITNESS: With the exception of some improvements, additional improvements.

“THE COURT: I mean as far as the property was concerned. Somebody sold it to you and you assumed that all the improvements were on the land?

“THE WITNESS: That is correct.

“THE COURT: And that is the way you sold it?

“THE WITNESS: That is correct, your Honor.

“THE COURT: And you also treated all the improvements as if they were on your land?

“THE WITNESS: I certainly did.”

We find a close parallel in *Williams v. Spazier*, 134 Cal. App. 340 [25 Pac. 2d 851]. In that case defendants sold fifty shares of stock to plaintiff for \$5,000 and in connection with the sale made certain representations as to the value of the stock and the plant of the company, all of which were untrue. Plaintiff sued to recover as damages the sum of \$5,000 paid for the stock. The trial court found that the representations were made by defendant positively as statements of fact, that when made they were known by him to be false, and that at the time he had no information upon the subject of said representations sufficient to warrant the making thereof (page 343). The evidence showed that the parties were dealing at arm's length,

that the information given by defendant to plaintiff had been obtained by him from the person from whom he had previously purchased the stock, that he had been deceived by Warren (the person from whom he purchased the stock), and did not know that he had been deceived until long after the transaction with plaintiff was completed. There was no proof that defendant had any knowledge of the value of the stock other than the information which had been given him by Warren, and which he passed on to plaintiff.

The court states that deceit, as defined by C. C. 1709 and 1710, is "(1) the suggestion, as a fact, of that which is not true, by one who does not believe it to be true; (2) the assertion, as a fact, of that which is not true by one who has no reasonable ground for believing it to be true; . . ." At page 346 the court points out that the finding of the court was that the representations made by defendants were false when made, known to be false and without any foundation in fact, and made as statements of fact when defendants at the time had no information upon the subject of said representations sufficient to warrant the making thereof. The court states:

"It will be noted that it is nowhere found that appellant did not have reasonable grounds for believing the statements to be true."

The court further states:

"The importance of this finding lies in the fact that there is not a word of evidence supporting the

first part of the finding—that the appellant knew the statements were false when he made these representations to the respondent. The undisputed and uncontradicted evidence is that the appellant was deceived by Warren, that he first consulted his banker and was given a favorable report of Warren and of the title company, that the statements which he made to the respondents were based on information given him by Warren, that he purchased from Warren stock in the company of like amount and at the same price as the respondents paid, and that he did not discover the falsity of Warren's representations until long after the transactions herein were completed. The case must rest, therefore, upon the second portion of the finding covering appellant's lack of information. As to this point the evidence is that appellant believed Warren after the recommendation of his banker and that he made no investigation of and had no information upon the financial standing of the title company other than what he had received from Warren. Now, whether these facts were sufficient to warrant the making of the statements or whether they formed reasonable ground for appellant's believing the representations to be true presents two entirely different lines of inquiry. What may be necessary to warrant the making of a statement depends upon all the circumstances under which the statement is made—the confidential or fiduciary relation between the parties, the mental capacity and business acumen of those to whom the statements are made, and the knowledge on the part of the maker as to the manner in which they will be received—whether with or without investi-

gation on the part of those to whom the statements are made. But whether a party has a reasonable ground for believing a statement to be true depends wholly upon the conditions under which he has formed that belief. Thus the fact depends upon the conditions existing prior to the making of the statement and does not depend, as in the other case, upon the circumstances under which, or the parties to whom, it is made. *Hence if the appellant believed these statements to be true, and the evidence shows that he did so believe, then the inquiry is, did he lack reasonable ground for believing them? Upon this issue there was no finding . . . there is no evidence that said misstatements were made (1) wilfully, (2) with intent to deceive, (3) that he did not believe them to be true, or (4) that he had no reasonable ground for believing them to be true. The respondents were bound to introduce proof not merely of a falsehood but of falsehood and fraud or deceit."* (Emphasis supplied.)

The judgment was reversed.

As stated in *Williams v. Spazier, supra*, the evidence shows unmistakably that appellants were deceived by their vendor, Keith Daniels; that they did not know that the statements were untrue at the time they were made, and that they simply passed along to appellees the information which they had obtained from their vendor. Upon this state of the record it is respectfully submitted that if a finding on the issue of knowledge had been made by the trial court, that it could only have been that the appellants had no knowledge of

the falsity of the representations, that they believed the representations to be true, and that they had reasonable grounds for believing them to be true.

Further bearing on the question of whether or not appellants lacked an honest belief in the truth of the statements made by them, we call the Court's attention to the fact that as part of the consideration for the sale of the property, appellants took back a promissory note secured by a second deed of trust in the sum of \$11,166.36. (Exhibits "A" and "B" attached to the complaint, Transcript of Record, pps. 32 to 34; Findings of Fact, paragraph III 4 (5), Transcript of Record, p. 52). This was almost 30% of the total purchase price. Surely, if appellants knew or had any reason to suspect that a substantial part of the improvements were not on the property which they were selling it is inconceivable that they would have taken back a second deed of trust in such a substantial amount on such doubtful security.

There is still another circumstance which demonstrates that appellants honestly believed that the representations made by them concerning the location of the improvements and the boundaries of the property were true. Prior to the sale to appellees, the house was about 80% damaged by fire. Appellants received \$15,100 in insurance and spent in excess of \$26,000 in rebuilding the house. It was rebuilt on the same foundation. (Transcript of Record, p. 132). Certainly if appellants knew or had any reason to suspect that any part of the house was on city property, they would not have rebuilt it

on property they did not own. If they had had this knowledge, it is reasonable to assume that they would have taken the insurance money and rebuilt the house in such a manner that it would be entirely within the confines of their own property, and would not have spent \$26,000 in rebuilding it on the old foundation so that about 1/3 of it was on city property.

As to the effect of reasonable ground for belief in the truth of the statements, the rule is stated in *1 Black on Rescission and Cancellation*, 319, §107, as follows:

“In several of the states where the substantive law has been codified, the statutes declare that ‘actual fraud’ may be committed by ‘the positive assertion in a manner not warranted by the information of the party making it, of that which is not true, though he believes it to be true,’ and that ‘deceit’ shall include, among other things, ‘the assertion as a fact of that which is not true, by one who has no reasonable ground for believing it to be true.’ (Reference is made in the text to Sections 1572 and 1710 of the California Civil Code). Under these statutes, therefore, a positive representation which is actually untrue has exactly the same effect, when the person making it has no reasonable ground for believing it to be true, as when he knows it to be false. And on the other hand, if the person making the representation believes it to be true, and has reasonable grounds for so believing, there is no actionable fraud committed, however false it may actually be.”

Again at page 321, §108, the writer states:

“In an action at law of deceit or to recover damages for fraudulent misrepresentations, or where such misrepresentations are set up in defense to an action on a contract, it is necessary to allege and show an intention to deceive, or to defraud by means of a deception, and the action can not be sustained, or the defense prevail, if it appears that the representations were made innocently and in good faith, without any intention to deceive . . .”

Many cases are cited in support of the text, including *Hodgkins v. Dunham*, 10 Cal. App. 690 [103 Pac. 351]. This was an action for damages for fraudulent representations made by defendant in connection with a sale to plaintiff. At page 706 of 10 Cal. App., the Court states:

“Were the representations actually believed by defendants on reasonable grounds to be true? If so, the rule exonerates them.”

The effect of an honest belief is stated in *37 Corpus Juris Secundum*, 263, §24, as follows:

“As a general rule, a misrepresentation made through honest error and with a bona fide belief in its truth is not fraudulent.”

Many California cases are cited in the text. Among these are the following:

Meeker vs. Cross, 59 Cal. App. 512 [211 Pac. 229]. At page 518 of 59 Cal. App., the Court states:

“Neither, in our opinion, is the evidence sufficient to justify the finding made by the court that the representation made by defendant was a ‘positive assertion made in a manner not warranted by the information of the defendant making it,’ which, if sustained by the evidence, would bring the case within the second subdivision of section 1572 of the Civil Code, which declares actual fraud to consist of ‘the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true.’ What we have heretofore said is likewise applicable to this phase of the case. *While the representation was concededly untrue, nevertheless the information which the defendant had with reference to the condition of the company and upon which he based the representation, justified him in believing it to be true and was warranted by the information which he had upon the subject.*” (Emphasis supplied).

Judgment for plaintiff was reversed.

Bartlett v. Suburban Estates, Inc., 12 Cal. 2d 527 [86 Pac. 2d 117]. At page 530 of 12 Cal. 2d, the Court states:

“But where the seller acted upon information sufficient to justify a reasonable man in concluding that no permit was required, then he is not liable in fraud even though he was mistaken in his belief.

“Therefore, insofar as the liability of the defendants in these actions is concerned. . . the plaintiffs cannot recover if the defendants acted

upon information sufficient to justify a reasonable man in believing that a permit was not required.”

This decision involved eight consolidated cases. Judgment of the trial court for plaintiffs in each was reversed.

Nunemacher v. Western Motor Transport Company, 82 Cal. App. 233 [255 Pac. 266]. At page 239 of 82 Cal. App., the Court states:

“It is true that ‘the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true,’ constitutes actual fraud. (Civ. Code, sec. 1572, subd. 2.) But in this case it reasonably appears that the representation in question was warranted by the information contained in the report of June 20th and the fact that the volume of business was steadily increasing. ‘Where a man makes a representation in the reasonable belief that it is true, fraud will not be imputed to him if it afterward be shown to be untrue, but there must be reasonable grounds for his belief.’ (*Maxson v. Llewelyn*, 122 Cal. 195, 198 [54 Pac. 732]; *Otis v. Zeiss*, 175 Cal. 192, 194 [165 Pac. 524]; *Nash v. Rosesteel*, 7 Cal. App. 504, 509 [94 Pac. 850]; *Hodgkins v. Dunham*, 10 Cal. App. 690 706 [103 Pac. 351]; *Meeker v. Cross*, 59 Cal. App. 512, 516 [211 Pac. 229].) The court found that ‘any and all representations or statements made by defendant to plaintiff at said time were made in the belief by defendant that same were true in each and every particular, and said belief that same were true in each and every particular was fully

justified by the facts and circumstances as they existed and were known to defendant at the time such representations or statements were made.' This finding is fully supported by the evidence.'

The judgment awarding plaintiff damages was reversed.

Other cases to the same effect are *Brown v. Harper*, 116 Cal. App. 2d 48, 53 [253 Pac. 2nd 95]; *Cox v. Westling*, 96 Cal. App. 2d 225, 229 [215 Pac. 2d 52]; *McElligott v. Freeland*, 139 Cal. App. 143, 154 [33 Pac. 2d 430]. In the case last cited at page 154 of 139 Cal. App., the Court states:

"Appellants further contend that, if it be assumed that the various representations specified in the findings were made and that they were false statements of fact, nevertheless the evidence wholly fails to support the trial court's finding that they were made knowingly. In other words, it is contended that proof of scienter was wholly lacking. It is a primary rule of the law of fraud that to warrant recovery for fraudulent representations it must appear that the party sought to be charged knew that the statements which he made were false."

To the same effect is *Walker v. Dept. of Public Works*, 108 C. A. 508 [291 Pac. 907]. At page 519 of 108 C. A. the Court states:

"At least it seems quite evident that these representatives of the appellant had no knowledge or reason to believe their statements were untrue. The evidence is therefore insufficient to support a judgment based upon fraud."

Judgment for plaintiff was reversed.

And in *Daley v. Quick*, 99 Cal. 179 [33 Pac. 859], at page 185 of 99 Cal.:

“ ‘A deceit within the meaning of this section (C. C. 1709) is defined as ‘the suggestion as a fact of that which is not true, by one who does not believe it to be true.’ If this be the ground relied upon, the evidence is wholly insufficient to show, taking the representations to have been false, that the person making them did not believe them to be true. ‘The assertion as a fact of that which is not true by one who has no reasonable ground in believing it to be true,’ is also a sufficient deception to have an action upon. But in this case there is no evidence tending to show that the person making the representations had no reasonable ground for believing them to be true.’ ”

When appellants purchased the property from Keith Daniels he gave them a map or sketch which showed that two feet of the carport encroached on Mulholland Drive, but that all of the other improvements were on the property. They had no other information regarding the south boundary line. (Transcript of Record, pp. 137 and 138). They assumed that the map was true and correct, (Transcript of Record, p. 141), and that all of the improvements were on their property. (Transcript of Record, p. 133).

This was sufficient basis for their belief that the representations made by them were true.

Nathanson v. Murphy, 132 Cal. App. 2d 363, 367 [282 Pac. 2d 174].

The rule exonerating one from liability for damages by reason of a misrepresentation made through honest error, and with a bona fide belief in its truth is the general rule and the great weight of authority. *Corpus Juris Secundum* recognizes that in a minority of jurisdictions scienter, knowledge of falsity, are not essential elements of actionable fraud, and that in these jurisdictions a misrepresentation may be actionable even though made innocently and honestly believed to be true. (37 *Corpus Juris Secundum* 265, §25). It is significant to note, however, that while many of the decisions previously referred to are cited in support of the majority rule, that no California cases are cited in support of the minority position. That California follows the majority rule, requiring proof of scienter, is established in *Wishnick v. Frye, supra*. As stated at page 931 of 111 Cal. App. 2d:

“Plaintiff erroneously argues that scienter is an ‘inconvenient requirement’ which has been dispensed with in eight American jurisdictions as an element of actionable fraud. However, this view is supported only by a minority of jurisdictions, while the courts of this state continue to adhere to the majority rule. (See 37 C.J.S. 265.)”

III.

Although Honest Belief or Lack of Knowledge Is Not a Defense in an Action for Rescission Based on Fraud, a Different Rule Applies in an Action for Damages. Authorities Involving Actions in Rescission Are Therefore Not in Point.

At this point a distinction should also be noted between the proof necessary in an action at law for damages based on fraud, and an action in equity for rescission. Although a party induced by fraud to enter into a contract may elect either to affirm and sue for damages, or disaffirm and seek rescission or other relief in equity, the proof required in both cases is not the same. It is well established that the elements essential to support an action for damages for fraud or deceit are sufficient to support an action based on rescission. However, the converse of the rule that what amounts to fraud in law constitutes fraud in equity is not in all instances true. As stated in *37 Corpus Juris Secundum* 219, §4:

“ . . . while an innocent representation may be insufficient to sustain a tort action for deceit it may be sufficient to sustain an action for rescission or for general equitable relief.”

The same distinction is recognized in *1 Black Rescission and Cancellation* 320, §107. In speaking of actions at law for fraud and deceit, the Court states:

“And conversely, if the circumstances are such as to justify a belief in the truth of the statement made, it is not fraudulent, although false.

“But while this test may be fairly satisfactory in an action of deceit or an action to recover damages for alleged fraud, it has been considered inappropriate when the relief sought is the rescission of a contract or other obligation. To establish the fact that the party making a representation believed it to be true, and had reasonable grounds for his belief, will prove his sincerity, and so eliminate from the case that element of turpitude or sinister design which lies at the base of any action of tort. But one who relies upon a false representation, and is injured thereby, is in exactly the same position whether the party making the representation was sincere or insincere. There may not have been such conscious fraud as would lay a foundation for the recovery of damages; yet it does not follow that the injured party should not be entitled to rescind.”

This distinction is recognized in *Wishnick v. Frye*, *supra*, 111 Cal. App. 2d 926 [245 Pac. 2d 532]. As previously stated, this was an action at law to recover damages for fraud and deceit. Plaintiff recovered judgment and was reversed on appeal upon the ground that there was no finding by the court of scienter or knowledge on the part of the defendant, without which the conclusion of fraud in an action for damages based on deceit could not be sustained. At page 931 of 111 Cal. App. 2d, the court states:

“Plaintiff earnestly argues that scienter is an ‘inconvenient requirement’ which has been dispensed with in eight American jurisdictions as an element of actionable fraud. However, this view is supported only by a minority of jurisdictions,

while the courts of this state continue to adhere to the majority rule. (See 37 C.J.S. 265.) Plaintiff cites a number of California decisions which he asserts show a tendency to depart from the rule requiring scienter. An analysis of these cases discloses that they do not support plaintiff's contention. A group of these cases involves rescission of land sales contracts by a vendee who was induced to purchase because of representations made by the vendor which were not warranted by the information available to him (*Scott v. Delta Land & W. Co.*, 57 Cal. App. 320 [207 P. 389]; *Muller v. Palmer*, 144 Cal. 305 [77 P. 954]; *Edwards v. Sergi*, 137 Cal. App. 369 [30 P. 2d 541]), or where rescission was granted the vendee on the theory that a vendor of land is presumed to know his own boundaries. (*Lombardi v. Sinanides*, 71 Cal. App. 272 [235 P. 455]; *Del Grande v. Castelhun*, 56 Cal. App. 366 [205 P. 18].) In all of these cases the findings fully supported the complaint of fraud. Plaintiff refers us to only two cases involving deceit actions, but neither is authority for his position. In *Gaffney v. Graf*, 73 Cal. App. 622 [238 P. 1054], the court found that defendant's positive statements of fact to a purchaser were made without sufficient information on which to base a reasonable belief in their truth. In *MacDonald v. de Fremery*, 168 Cal. 189 [142 P. 73], a judgment in a deceit action in favor of defendants was reversed, partly for the reason that the evidence revealed that defendants must have known of the falsity of their statements."

The Federal Courts also recognize this distinction and follow the majority rule. In *Woods-Faulkner &*

Co. v. Michelson, 63 Fed. (2) 569, [C.C.A., 8th Cir. Feb. 17, 1933], the action was brought for rescission of a stock purchase transaction based upon false and fraudulent representations. The Court recognizes the distinction between an action in equity for *rescission* and one at law for damages, insofar as the question of scienter is concerned. At page 572:

“This is a suit in equity to rescind a contract, and not an action at law for damages on account of fraud and deceit. . . . The distinction between the two remedies is pointed out by this court in *Kimber v. Young*, 137 F. 744, 747, where it is said: ‘*The basis of the action of deceit is the actual fraud of defendant—his moral delinquency; and therefore his knowledge of the falsity of the representation, or that which in law is equivalent thereto, must be averred and proved. There is much confusion in the authorities upon this subject, due in part to the erroneous assumption that that which is merely evidence of fraud is equivalent to the ultimate fact which it tends to prove, and also to the assumption, likewise erroneous, that an untrue representation which would be sufficient to support a suit in equity for a rescission of a contract is equally as available in an action of deceit.*’

“While the elements essential to sustain an action at law for fraud and deceit are sufficient to sustain a suit in equity for rescission of the contract of sale, the converse of this statement is not true. Even an innocent misrepresentation is sufficient to sustain an action to rescind, while, *to sustain an action for damages for fraud and deceit,*

the representation must have been actually fraudulent, involving moral delinquency.” (Emphasis supplied.)

IV.

The Conclusion of Law That Plaintiffs Are Entitled to Judgment in the Sum of \$15,000 Is Not Supported By the Findings of Fact.

The measure of damages in cases of fraud arising out of the sale of real property is laid down by *Section 3343* of the Civil Code of the State of California, and is what is known as the “out of pocket” rule. Under this rule plaintiffs can recover only the difference between the price paid for the property and the value of the property which they received. This is established by the recent case of *Bagdasarian v. Gragnon*, 31 Cal. 2d 744 [192 P. 2d 935]. The “out of pocket” rule is followed in the Federal Court. *Bagdasarian v. Gragnon, supra*, page 759, citing *McCormick on Damages* (1935), 448-454; 24 Am. Jur. 58-62; (1939) 13 So. Cal. Law Rev. 168-170.

In order to support the judgment in favor of appellees for damages there must be a finding, first, of the price paid for the property, and second, a finding of the value of the property received by them. Paragraph V of the Findings of Fact recites that appellees gave to appellants the contractual consideration, which, as stated in paragraph III, subparagraph 4 (1), was \$38,000. *However, there is no finding of the value of the land and improvements received by appellees.* The

failure of the court to find on this material issue is prejudicial error. *Bagdasarian v. Gragnon, supra*, page 763.

Nor is this defect cured by the last sentence in paragraph VI of the Findings of Fact that "it is untrue that defendants' land as it actually existed was worth \$38,000.00." This is clearly a negative pregnant and is an admission that the property was worth any sum less than \$38,000, to-wit: \$37,999. To support the conclusion of the law that plaintiffs are entitled to judgment in the sum of \$15,000, and the judgment in that amount, there must have been a finding that the property received by them was worth \$23,000 and no more. This is not the effect of the finding as contained in paragraph IV that it is untrue that the land was worth \$38,000. It is just as logical under the finding as made to say that the land was worth \$37,999, as it is to contend that it was worth only \$23,000.

As stated in *24 Cal. Jur.* 976, §208:

"A finding in the form of a negative pregnant, attempting to negative an affirmative allegation, implies the truth of such allegation."

Cases involving the insufficiency of pleadings in the form of a negative pregnant are analogous. Typical of these are the following:

Janeway & Carpenter v. Long Beach Paper & Paint Co., 190 Cal. 150 [21 Pac. 6]. At page 153 of 190 Cal.:

The denial of nonpayment of \$6,190.88 was in the following form:

Defendant "... denies that the said sum of \$6,190.88 has not been paid."

The Court said:

"This is an admission that the sum of \$6,190.87 is unpaid. . . ."

Beetson v. Hollywood Athletic Club, 109 C. A. 715 [293 Pac. 821]:

Plaintiff alleged damage to his automobile in the sum of \$254.19. Defendant denied "that said automobile was damaged . . . in the sum of Two Hundred Fifty-four and 19/100 Dollars (\$254.19)."

The Court, at page 723 of 109 C. A., said:

"By thus answering in the form of a negative pregnant, defendant admitted that the damage to said automobile was any sum less than \$254.19, to-wit: \$254.18."

Armer v. Dorton, 50 C. A. 2d 413 [123 Pac. 2d 94]:

Plaintiff alleged that the reasonable value of the use of his automobile was \$105.00. The denial was in the form of a negative pregnant. The Court, at page 415 of 50 C. A. 2d, said:

"Under the authorities it must be held that a denial in such form is a negative pregnant, so far as the value of the loss of use is concerned, and that appellants' answer must be taken as an admission that the reasonable value of the loss of use was

any sum less than \$105. In the case of *Preston v. Central Cal. etc. Irr. Dist.*, 11 Cal. App. 190 [104 Pac. 462], the court said:

“ ‘The answer . . . is as follows: ‘Said defendant denies that the defendant became justly or otherwise indebted to B. E. Hooper . . . between the first day of March, 1907, and the first day of September, 1907, or any other time, in the sum of four hundred and thirteen and 56/100 dollars.’

“ ‘It is at once apparent that the foregoing denial involves a negative pregnant, the denial being in the precise sum alleged in that count of the complaint, and, therefore, an admission of an indebtedness of any lesser amount. (*Blankman v. Vallejo*, 15 Cal. 638; *Towdy v. Ellis*, 22 Cal. 650; *Estee’s Pleadings*, sec. 3174.)’

“ ‘In *Connecticut Mutual Life Insurance Co. v. Most*, 39 Cal. App. (2d) 634 [103 Pac. (2d) 1013], where the answer of defendant merely denied that the specific amount alleged in plaintiff’s complaint to be due was due, the court said at page 640:

“ ‘Under proper rules of pleading the allegations might be construed as an admission that all but a single dollar of the amount claimed due was actually due and payable. The allegation of the answer, containing as it does a negative pregnant, was evasive and wholly insufficient to raise the issue of payment. (*Blankman et al. v. Vallejo*, 15 Cal. 639, 645; *Masters v. Lash*, 61 Cal. 622, 624; *Westbay v. Gray*, 116 Cal. 660, 663 [48 Pac. 800]; *Provident Gold Min. Co. v. Haynes*, 173 Cal. 44, 48 [159 Pac. 155]; *Jancway & Carpender v. Long Beach Co.*, 190 Cal. 150, 153 [211 Pac. 6]; *Motor Investment Co. v. Breslauer*, 64 Cal. App. 230, 240 [221 Pac. 700].)’ ”

Schroeder v. Mauzy, 16 C.A. 443 [118 Pac. 459]: Plaintiff's piano was destroyed by fire while in defendant's possession. Plaintiff sued to recover its value, which he alleged to be \$1000.00, defendant having failed to insure it as agreed. At page 446 of 16 C.A. the court said:

"The answer of the defendant denied that he had caused the piano to be insured for plaintiff's benefit or at all, and by specific denials put in issue every other material allegation of the plaintiff's complaint, save and except the allegation of the loss and the value of the piano.

"The defendant's attempted denial of the alleged value of the piano, in the form of a negative pregnant, was not a denial of the allegation in the complaint, but was an admission that the piano, at the time specified in the complaint, was of the value of any sum less than \$1,000, and raised no issue upon the subject of value as pleaded by plaintiff. (*Leffingwell v. Griffing*, 31 Cal. 232; *Scovill v. Barney*, 4 Or. 288.)"

Kennedy v. Rosecrans Gardens, Inc., 114 C.A. (2d) 87 [249 Pac. (2nd) 593]: At page 89 of 114 C.A. (2d), the court said:

"Plaintiff alleged in paragraph VII of his complaint he had been damaged in the sum of \$3,500. Defendant denied 'each and every allegation' of paragraph VII. The court found the allegations of paragraph VII to be untrue but made no other findings as to damage. The answer was merely a denial that plaintiff had suffered damage in the amount of \$3,500 and was an admission that he had suffered substantial damage."

The finding with respect to damages is defective in still another particular. As appears from Exhibit "A" attached to the complaint (Transcript of Record, pages 17 and 18), included in the purchase price of \$38,000 was the furniture in the guest house. The appraiser P. B. Baehr testified as follows:

"My market value of the property as it appeared to exist was not \$38,000. There was personal property involved which cut the value down." (Transcript of Record, p. 79).

He was not asked and he did not testify as to the value of the personal property. Nor did the Court make any finding as to the value of the personal property. We find the same situation in *Bagdasarian v. Gragnon, supra*, where the court failed to make a finding as to the value of certain farm equipment which was included as part of the total consideration paid by the plaintiff. At page 763, the court states:

"Since the items of the transaction were not severable, the sum paid for the farm equipment must be included as a part of the total consideration given by respondents and the actual value of the farm equipment must be included as a part of the value of the property received by respondent. . . . *No finding was made, however, as to the value of this property, and the failure to determine the amount and to include it in computing the value of the property received constituted prejudicial error.*" (Emphasis supplied)

So in the instant case, the furniture in the guest house was obviously included as part of the total consideration given by appellants. The escrow instructions, Exhibit "A" attached to the complaint (Transcript of Record, p. 18) state that the furniture in the guest house is to be delivered at close of escrow without additional consideration. In determining the amount of appellees' "out of pocket" loss, to which they are limited by the provisions of Section 3343 of the Civil Code, no claim being made that any misrepresentations were made concerning the furniture, appellants were entitled to credit for the reasonable market value of the furniture. As stated in *Bagdasarian v. Gragnon*, no finding was made as to value of this property and the failure to determine the value thereof, and to include it in computing the value of the property actually received by appellees, constituted prejudicial error.

V.

Paragraph V of the Court's Findings of Fact, That It Is True That Plaintiffs Relied Upon Plaintiffs' (sic) Representation, Is Not Supported by the Evidence.

A literal reading of this finding is that plaintiffs relied upon their own representations in purchasing the property. However, we will assume that it was intended to state that plaintiffs relied upon defendants' representations, and not upon their own, and will discuss this finding as though it read as follows:

"It is true that plaintiffs relied upon defendants' representation . . . "

As stated in *Gonsalves v. Hodyson*, 38 Cal. 2d 91 [237 P. 2d 656], at page 100 of 38 Cal. 2d:

"In an action for damages for deceit, the fraudulent representation relied upon must be as to a material fact which is false and known to be false by the maker, or is recklessly made or made without reasonable grounds for believing its truth. It must be made with intent to induce action by the other party and *it must have been relied upon by the other party with justification*. It must result in damage or injury to the party so relying. *The absence of any one of these elements will preclude recovery.*" (Emphasis supplied).

As stated in 23 Cal. Jur. 2d 95, §39:

"Inasmuch as notice of facts and circumstances which would put an ordinarily prudent and intelligent person on inquiry is in the eye of the law

equivalent to knowledge of all of the facts that a reasonably diligent inquiry would disclose, it is an established principal that though one in the original instance may have been justified in relying on representations, still when, thereafter, he discovers that he has been deceived and defrauded as to one material matter, he has notice that he may have been defrauded as to other matters, and is bound to make a full investigation.”

We direct the Court’s attention to the fact that Mrs. Stone testified that she had a conversation with Mrs. Farnell on the property prior to the sale; that she had a sketch or map with her which had been given to her by Keith Daniels, the former owner; and that this map or sketch showed that two feet of the carport encroached on Mulholland Drive, but that everything else was within the boundary lines of the property. She testified further that she told Mrs. Farnell that two feet of the carport was on city property; that she had obtained the map from Mr. Daniels, the former owner, and that she gave it to Mrs. Farnell. (Transcript of Record, pp. 137 and 138). The Farnells said nothing and made no protest. (Transcript of Record, p. 142). *Mrs. Farnell did not deny any part of this testimony.* It should be pointed out that this conversation was between Mrs. Stone and Mrs. Farnell. Mrs. Stone testified that Mr. Farnell was not present. (Transcript of Record, p. 137). This was not the conversation between Mr. Farnell and Mrs. Stone concerning which Mrs. Farnell testified. (Transcript of Record, pp. 128 and 129).

It is therefore established without contradiction that prior to the consummation of the sale, Mrs. Farnell was told that two feet of the carport encroached on city property, and that she was given a map or sketch showing this to be the case. Under such circumstances, it became the duty of the purchasers to make a complete investigation. (23 *Cal. Jur.* 2d 95, §39), and appellees were not entitled to rely upon the representations made by the sellers.

As stated in *Carpenter v. Hamilton*, 18 Cal. App. 2d, 69 [62 Pac. 2d 1397], at page 75 of 18 Cal. App. 2d:

“The rule is universally recognized in fraud cases that where the buyer is aware of suspicious circumstances or has learned of the falsity of one or more of the representations he is under a legal duty to make a complete investigation and may not rely upon the statements of the seller. (*Gratz v. Schuler, supra*; 12 *Cal. Jur.*, sec. 37, p. 763.) Plaintiffs were not dissuaded from making a complete investigation by any artifice of defendant and they therefore cannot complain of conditions which they would have discovered if they had pursued their investigations to the end.

“Plaintiffs’ testimony that they relied upon the representations cannot stand against the other evidence from which they must be held to have had knowledge of their falsity. Courts cannot be expected to extricate persons from entanglements into which they have fallen through their own neglect of duty. The rule which applies in the case of actual knowledge of the facts has equal application where the facts would have been ascertained

in the performance of a duty to use ordinary care.

“For each of the reasons stated the evidence was insufficient to support a recovery based on fraud.”

A leading case in California is *Hobart v. Hobart Estate Co.*, 26 Cal. 2d 412 [159 Pac. 2d 958]. This case cites and quotes from many of the earlier California cases, and we will therefore quote at length from the decision of the court commencing at page 437 of 26 Cal. 2d:

“Section 19 of the Civil Code provides: ‘Every person who has actual notice of circumstances *sufficient to put a prudent man upon inquiry* as to a particular fact, has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he might have learned such fact.’ (Italics added.) . . . *The circumstances must be such that the inquiry becomes a duty, and the failure to make it a negligent omission.*’ (Italics added.) Many other decisions have adopted this view. (See *Mary Pickford Co. v. Bayly Bros., Inc.*, 12 Cal. 2d 501, 511 [86 P. 2d 102]; *Original Min. & Mill. Co. v. Casad*, 210 Cal. 71, 76 [290 P. 456]; *Prewitt v. Sunnymead Orchard Co.*, 189 Cal. 723, 730 [209 P. 995]; *Victor Oil Co. v. Drum*, 184 Cal. 226, 241 [193 P. 243]; *Lady Washington C. Co. v. Wood*, 113 Cal. 482 [45 P. 809]; *West v. Great Western Power Co.*, 36 Cal. App. 2d 403, 406, et seq. [97 P. 2d 1014]; *Denson v. Pressey*, 13 Cal. App. 2d 472 [57 P. 2d 522]; *Edwards v. Sergi*, 137 Cal. App. 369 [30 P. 2d 541]; cf. *Smith v. Martin*, 135 Cal. 247, 254-255 [67 P. 779].) In many cases it has

been said that means of knowledge are equivalent to knowledge. (See *Shain v. Sresovich*, 104 Cal. 402, 405 [38 P. 51]; *People v. San Joaquin etc. Assn.*, 151 Cal. 797, 807 [91 P. 740]; *Consolidated R. & P. Co. v. Scarborough*, 216 Cal. 698, 701, et seq. [16 P. 2d 268]; *Knapp v. Knapp*, 15 Cal. 2d 237, 242 [100 P. 2d 759]; *Bainbridge v. Stoner*, 16 Cal. 2d 423, 430 [106 P. 2d 423]; *Merrill v. Los Angeles Cotton Mills, Inc.*, 120 Cal. App. 149, 158 [7 P. 2d 329]; *Daily Tel. Co. v. Long Beach Press Pub. Co.*, 133 Cal. App. 140, 143-147 [23 P. 2d 833]; *Wheaton v. Nolan*, 3 Cal. App. 2d 401, 403 [39 P. 2d 457]; *Haley v. Santa Fe Land Imp. Co.*, 5 Cal. App. 2d 415, 420, 423 [42 P. 2d 1078]; *Vertex Inv. Co. v. Schwabacher*, 57 Cal. App. 2d 406, 415-418 [134 P. 2d 891]; *Bryan v. Nicolas*, 67 Cal. App. 2d 898 [155 P. 2d 835]; cf. *Truct v. Onderdonk*, 120 Cal. 581, 589 [53 P. 26]; *Phelps v. Grady*, 168 Cal. 73, 79-80 [141 P. 926]; *Malone v. Clise*, 18 Cal. App. 2d 154, 157 [63 P. 2d 321].) This is true, however, only where there is a duty to inquire, as where plaintiff is aware of facts which would make a reasonably prudent person suspicious. In the *Lady Washington case*, the court said (113 Cal. at p. 487) that 'as the means of knowledge are equivalent to knowledge, *if it appears that the plaintiff had notice or information of circumstances which would put him on an inquiry* which, if followed, would lead to knowledge, or that the facts were presumptively within his knowledge, he will be deemed to have had actual knowledge of these facts.' "

Knowledge of the fact that two feet of the carport encroached on city property was sufficient to put ap-

pellees upon inquiry as to the true location of the boundary line and the improvements on the property. The means of discovery of the facts concerning the location of the boundary line were readily available to them. They had but to go to the City Engineer's office to obtain full information. This is what Mr. Farnell did after the sale. (Transcript of Record, pp. 118 and 119). If they had acted as reasonably prudent persons they would have made the same inquiry immediately after being told that two feet of the carport was on city property, and if they had done so, the mistake would have been discovered at that time. It was their legal duty to make such inquiry and not having done so, they had no right to rely on the statements made by appellants. *Hobart vs. Hobart Estate Co., supra.*

The maps and records in the City Engineer's office are matters of public record. As stated in *23 Cal. Jur.* 2d 156, §63:

“Relief cannot be granted on the ground of fraud where it appears that the party seeking it, when the duty was incumbent on him to investigate, has, through his own negligence, failed to ascertain matters of public record. The rule is that one is presumed to know whatever he might, with reasonable diligence, have discovered; and when the facts on which the alleged fraud rests are matters of public record, open to inspection, ignorance of the fraud will not excuse him.”

It is therefore respectfully submitted that the finding that appellees relied upon the representations made by appellants is entirely without factual or legal support.

VI.

The Evidence at Best Shows That Appellants Were Mistaken as to the Boundaries of the Property and the Location of the Improvements. An Allegation of Fraud Is Not Sustained by Proof of Mistake.

We direct the court's attention to the following colloquy between the court and counsel at page 59 of the Transcript of Record:

"The Court: As I understand from the statements of counsel this property was sold by the seller to a purchaser and afterwards the property was surveyed and it was found that all the improvements were not on the property sold.

Mr. Pollack: That is correct, Judge Harrison.

The Court: There had been a mistake as to the boundaries.

Mr. Cutler: That is so stipulated and that is the fact."

As the record will show, Mr. Pollack was the attorney for the appellants in the trial court, and Mr. Cutler was the attorney for appellees. It is clear from the statement of the court and the stipulation of counsel above quoted that a mistake existed as to the boundaries of the property. However, an allegation of fraud

is not sustained by proof of mistake. It was so held in *Mercier v. Lewis*, 39 Cal. 532. In that case the complaint charged defendants with fraud in conveying certain real property. At the trial plaintiff failed to prove the fraud as alleged. The court ordered judgment against the defendants based upon a mistake in the deed. At page 535 the court states:

“It is apparent that the judgment is erroneous. *The plaintiff’s allegation of actual fraud is not sustained by proof of the mistake.*” (Emphasis supplied)

The judgment was reversed. *Mercier v. Lewis* is cited and the rule as above stated is approved in *Cardozo v. Bank of America*, 116 Cal. App. 2d 833, [254 Pac. 2d 949], at page 837 of 116 Cal. App. 2d.

It is respectfully submitted that the evidence in the record, including the stipulation of counsel, establishes nothing more than a mistake. This being so, the judgment based upon a conclusion of law that the appellants were guilty of fraud can not be sustained.

VII.

There Is No Finding of Fact on the Issue of Whether or Not the Representations Alleged To Have Been Made by Appellants Were False and Fraudulent as Alleged in Paragraphs IV, X and XI of the Complaint.

It is alleged in paragraph IV of the complaint that the statements and representations set forth in paragraph III were false and fraudulent and were known by appellants to be false and fraudulent when made. It is alleged in paragraph X that at the time of the sale appellants knew the facts alleged in paragraph IX, namely, that the boundary line of the property ran through the main residence, and that one-third of the main residence, the carport, guest house, cesspool and septic tank, and portions of the walks and driveways and of the landscaping and other appurtenances, were entirely off the property and on Mulholland Drive. It is alleged in paragraph XI that appellants falsely and fraudulently represented that the property was well worth the purchase price of \$38,000. Issue was joined on each of these allegations and they were specifically denied by paragraphs I, III and IV of the answer to the second cause of action. (Transcript of Record, pp. 26 and 27).

Obviously fraud was the gist of the complaint and the issue tendered by the pleadings was as to whether or not the representations attributed to appellants were fraudulently made. It is elementary that the

parties to an action are entitled to findings of fact on all material issues. The general rule is stated in 24 *Cal. Jur.* 935, §183, as follows:

“Under the system of express findings now provided for, full findings, unless waived, are required on all material issues raised by the pleadings and evidence.”

Three full pages of authorities are cited in support of the text. As the rule is fundamental we will refer the court to but a few of the many authorities cited and respectfully direct the court's attention to the following:

DeBurgh v. DeBurgh, 39 Cal. 2d 858 [250 Pac. 2d 598]. At page 873 of 39 Cal. 2d:

“It is essential that findings be made on every material issue raised by the pleadings. (Citations)”

Commeford v. Baker, 127 Cal. App. 2d 111 [273 Pac. 2d 321]. At page 120 of 127 Cal. App. 2d:

“It is a settled rule of appellate procedure that *a judgment may not stand in the absence of findings on the material issues which support the judgment.*” (Emphasis supplied)

Andrews v. Cunningham, 105 Cal. App. 2d 525 [233 Pac. 2d 563]. At page 528 of 105 Cal. App. 2d:

“It is elementary law, recently reiterated in *Fairchild v. Raines*, 24 Cal. 2d 818, 830 [151 P. 2d 260] that: ‘Ever since the adoption of the codes, it has been the rule that findings are re-

quired on all material issues raised by the pleadings and evidence, unless they are waived, and *if the court renders judgment without making findings on all material issues, the case must be reversed.*" (Emphasis supplied)

J. J. Howell and Associates, Inc. v. Antonini, 124 Cal. App. 2d 388 [268 Pac. 2d 557]. At page 391 of 124 Cal. App. 2d:

"Where an action is tried before the court without a jury, in the absence of a waiver, findings are required upon all material issues presented by the pleadings and the evidence. *If the court renders judgment without making such findings, the judgment must be reversed.* (*Hicks v. Barnes*, 109 Cal. App. 2d 859, 862 [241 P. 2d 648].)" (Emphasis supplied)

The rule that findings must be made on all material issues is particularly applicable in actions involving fraud. As stated in 23 *Cal. Jur.* 2d 218, §87:

"Allegations of fraud are serious charges, and ordinarily a finding should be expressly made on each issue presented."

Illustrative of the many cases sustaining the rule as applied to fraud actions are the following:

Golson v. Dunlap, 73 Cal. 157 [14 Pac. 576]. At page 164 of 73 Cal.:

"The ultimate ground upon which transactions between trustees and *cestui que trust* are set aside

is fraud, actual or constructive, as the case may be; and the rules of pleading require that the facts constituting the fraud (of which this is one) shall be set forth. Being properly pleaded, such facts must be found. For, under our system, whatever is properly in issue must be found, unless there are other issues which effectually and finally dispose of the case.”

Field v. Austin, 131 Cal. 379 [63 Pac. 692]. At page 382 of 131 Cal.:

“The above findings, it is quite clear, do not respond to the issues as to fraud made by the allegations of the answers, and the case therefore stands without findings as to these issues.”

Judgment for plaintiff was reversed by reason of the court’s failure to find upon the issue of fraud and other issues involved.

Floyd v. Tierra Grande Development Company, 51 Cal. App. 654 [197 Pac. 684]. At page 664 of 51 Cal. App.:

“Allegations of fraud being serious in their effect, a finding should ordinarily be expressly made by the court on each issue presented. Fraud is never presumed. It must be satisfactorily proved.”

Strong v. Strong, 22 Cal. 2d 540 [140 Pac. 2nd 386]. At page 546 of 22 Cal. 2d:

“In the present case there was not only no pleading, but no finding of fraud, *and a judgment*

is not supported by proof of fraud if there is no finding of fraud. (Citations)” (Emphasis supplied).

James v. Haley, 212 Cal. 142 [297 Pac. 920]. At page 147 of 212 Cal.:

“Ever since the adoption of the codes, it has been the rule that findings are required on all material issues raised by the pleadings and evidence, unless they are waived, and *if the court renders judgment without making findings on all material issues, the case must be reversed.* (24 Cal. Jur., p. 935, sec. 183, and p. 940, sec. 186.)” (Emphasis supplied).

These principles are not only the well established rule in California, but also the rule followed in the Federal courts. So far as is pertinent, rule 52(a) of the Federal Rules of Civil Procedure provides as follows:

“In all actions tried upon the facts without a jury, the Court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment”

In 8 *Cyclopedia of Federal Procedure* (Second Edition), page 34, par. 3144, the rule is thus stated:

“The findings should conform to the issues made by the pleadings.”

The case of *Felder v. Reeth*, 34 F. (2d) 744, a decision of the Circuit Court of Appeal for the 9th Circuit,

is cited in support of the text. That the rule as above stated has been followed in the 9th Circuit further appears from the decision in *Perry v. Baumann*, 122 F. (2d) 409. In that case the Court states at page 410, as follows:

“Rule 52(a) of the Rules of Civil Procedure provides: ‘In all actions tried upon the facts without a jury, the Court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment . . . ,’

“It, therefore should have been followed in this case. Order reversed and case remanded to the District Court”

The importance of specific findings as required and provided by rule 52(a) has been recognized by the Supreme Court of the United States. In the case of *Mayo v. Lakeland Highlands Canning Company*, 309 U. S. 310, the Court at page 316, states as follows:

“It is of the highest importance to a proper review of the action of a Court in granting or refusing a preliminary injunction that there should be fair compliance with rule 52(a) of the Rules of Civil Procedure.”

In the instant case not only has there not been a fair compliance with rule 52(a), but there has been an entire lack of compliance insofar as findings on the question of knowledge or scienter is concerned. Absent such finding, the judgment cannot be sustained. (*Wishnick v. Frye, supra*).

An examination of the court's findings of fact discloses that there is no finding whatsoever upon the matters alleged in paragraph IV of the complaint (that the representations in paragraph III were fraudulently made); upon the allegations of paragraph X of the complaint (that the allegations of paragraph IX were fraudulently made); or upon the allegations of paragraph XI (that the defendants fraudulently represented that the property was worth \$38,000). Thus, there is no finding whatsoever that any of the statements or representations alleged to have been made by appellants were fraudulently made. In the absence of such findings the judgment predicated upon the court's conclusion of law that appellants committed both constructive and actual fraud under California law is entirely without support, and must be reversed.

VIII.

**The Judgment Against Appellants Should Be Reversed
With Instructions to the Court Below to Enter Judgment
in Favor of Appellants on Their Counterclaim
for Foreclosure as a Mortgage of the Deed of Trust
Described in Said Counterclaim.**

Appellees in paragraph II of their answer to the counterclaim admit that the payments due on the promissory note referred to in the counterclaim, from and after February 5, 1955, have not been paid. (Transcript of Record, p. 37). The reason advanced for the failure to make the payments are the matters alleged in the second cause of action of the complaint. It was stipulated at the trial that the payments had not been made, as appears at page 148 of the Transcript of Record:

“Mr. Pollack: I think it is admitted that the payments weren't made, isn't that true?

“Mr. Cutler: The payments were not made? Yes. I admitted in the answer to the counterclaim that you alleged that payments have not been made except—that payments have not been kept up on the second trust deed but they have on the first.

“Mr. Pollack: Yes.

“Mr. Cutler: Pending this action.

“Mr. Pollack: Yes. And that the second trust deed is in default except for the defenses you have alleged.

“Mr. Cutler: Yes. . . . ”

We believe that we have demonstrated that the judgment against appellants is contrary to the law and the evidence and must be reversed. If this is so, then appellees have no defense to the counterclaim, as admittedly the payments required to be made by the promissory note secured by the second deed of trust have not been made, and appellants are entitled to judgment upon their counterclaim in accordance with the prayer thereof.

CONCLUSION

It is respectfully submitted that the judgment in favor of appellees and against appellants should be reversed, with instructions to the court below to enter judgment against appellees and in favor of appellants upon their counterclaim, for the balance due upon the promissory note referred to therein, and reasonable attorney fees, as therein provided, and for foreclosure as a mortgage of the deed of trust described in said counterclaim, in accordance with the prayer thereof.

Respectfully submitted,

LEO SHAPIRO

*Attorney for Appellants,
George Wesley Stone and
Hildegard W. Stone*



No. 15024.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GEORGE WESLEY STONE and HILDEGARD STONE,

Appellants,

vs.

JACK W. S. FARNELL and ELISABETH PATTER FARNELL,

Appellees.

APPELLEES' BRIEF.

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FILED

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PAUL P. O'BRIEN, CLERK



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APPELLEES' BRIEF.

I.

Statement of Pleadings and Facts Showing Jurisdiction.

Appellees (plaintiffs) are residents of the State of California. They filed their complaint against appellants (defendants) who are residents of the State of New York. The complaint was filed in the Superior Court of the State of California in and for the County of Los Angeles on the 14th day of January, 1955. The matter in controversy exceeds the sum of \$3,000.00, exclusive of interest and costs. Since the action is between citizens of different states and the sum in controversy exceeds \$3,000.00, the United States District Court would have original jurisdiction of the action pursuant to 28 U. S. C. A. 1332(a) (1).

The proceedings were removed by appellants to the United States District Court for the Southern District of California, Central Division, pursuant to 28 U. S. C. A. 1441(a). The petition for removal alleged the diversity of citizenship of the parties. Thereafter appellants filed an answer and counterclaim as authorized by F. R. C. P. 81(c). The Bank of America was named as a defendant to the counterclaim, but was subsequently dismissed to avoid destroying diversity of citizenship and depriving the United States District Court of jurisdiction.

II.

Statement of the Case.

Appellants' statement of the case assumes facts most favorable to appellants and resolves conflicts in the evidence in appellants' favor. The decisions say that the opposite assumption and resolution of conflicts must be made in aid of the judgment of the trial court. As a consequence, important inaccuracies appear in appellants' statement of the case which is wholly inadequate to constitute an analysis of the evidence. The numerous and substantial conflicts in the evidence are not mentioned. However, the most important error is the assumption that the trial court believed Mr. and Mrs. Stone, which seems most unlikely in light of the judgment against them.

For convenience of discussion sometimes appellants will be referred to as the Stones or Mr. and Mrs. Stone, as the case may be, and sometimes appellees will be referred to as the Farnells or Mr. or Mrs. Farnell.

The fact that the Stones sold a parcel of improved residential real property to the Farnells for \$38,000.00 and the further fact that approximately one-third of the main residence, the carport, the guest house, the cesspool and septic tank, and portions of the walks, driveways and landscaping and other appurtenances were not on the parcel of real property sold to the Farnells is admitted by all parties to this action. As the result of a survey made by the Farnells eight months after the purchase, the Farnells discovered the latter fact.

Appellants' statement of the case gives the impression that the Stones as well as the Farnells first learned the facts as a result of the survey. Whether or not the Stones knew this prior to the sale to the Farnells was one of the litigated issues, a fact which should be borne in mind.

Appellants' statement of the case infers that the testimony of Mrs. Stone about a purported conversation with Mrs. Farnell was necessarily accurate because it was not denied by Mrs. Farnell.¹ Mrs. Farnell was not called to the witness stand after Mrs. Stone had testified, but Mrs. Stone's cross-examination conflicted with her direct examination and with other testimony. So it is most reasonable for the trial court to believe either that there was no such conversation or that she was mistaken as to

¹The trial court is not required to accept as truth the testimony of a witness even if it were uncontradicted. (*Lombardi v. Tranchina* (1954), 129 Cal. App. 2d 778, 780, 277 P. 2d. 933; *United States v. Fotopulos* (C. C. A. 9, 1950), 180 F. 2d 631.)

the parties present and was speaking about the same conversation concerning which Mr. and Mrs. Farnell testified. In either event the judgment is consistent with the thought that the trial court did not believe Mrs. Stone's testimony.

The same may be said of Mrs. Stone's testimony about a map or sketch. It is quite apparent that this was the same map or sketch which Mr. Farnell referred to. However, Mrs. Stone said that it showed the location of the improvements on the property, while Mr. Farnell testified that it did not.

Appellees believe that there is adequate evidence of damage and much more than is mentioned by appellants. Ultimately every question of conflicting evidence becomes a question of whether or not there is evidence to sustain the trial court. All of the evidence was weighed in the trial court and credibility of witnesses was taken into account. It is the accepted appellate rule that the trial court's determination of these matters will not be disturbed on appeal and that a judgment will be sustained against an attack upon the sufficiency of the evidence if there is any substantial evidence to support the judgment.²

This being the law, it seems most direct and convenient to discuss the evidence and its conflicts in argument where they arise in opposition to the primary points of appellants' appeal, which points are based upon the contention that there is no evidential support for the judgment.

²*Lassiter v. Guy F. Atkinson Co.* (1949, C. A. 9th), 176 F. 2d 984; *Calif. Bank v. Sayre* (1890), 85 Cal. 102; *Estate of Chamberlain* (1941), 44 Cal. App. 2d 193, 112 P. 2d 53; *Carvalho v. McCoy* (1954), 128 Cal. App. 2d 702, 276 P. 2d 21.

III.

Introduction to Argument.

Although the caption to appellants' first point indicates that it contains a discussion of the evidence, it is devoted to a discussion of the necessity for certain findings. The second point of appellants' argument discusses the evidence.

Appellants' list of questions involved and their specification of errors upon which appellants rely are almost all dependent upon assumed facts. The difference in viewpoint between appellants and appellees on this subject which has already appeared is a serious and perhaps a decisive issue on appeal.

Appellants sought to establish that all of the elements of actionable fraud must be found by the court and then that the evidence was insufficient to warrant such findings. A different approach has been adopted by the appellees in that the nature of actionable fraud is discussed and then it is pointed out that the record contains sufficient evidence to establish actionable fraud. That the findings and conclusions are sufficient to support the judgment, is separately treated. It is necessary to discuss the law of fraud and deceit briefly, but the sufficiency of the evidence is the meat of the coconut.

IV.

Argument.

1. **A Positive Assertion, in a Manner Not Warranted by the Information of the Person Making It, of That Which Is Not True, Though He Believes It to Be True, Is Actual Fraud When Made to Induce Another to Enter Into a Contract.**

The principles of fraud and deceit are well established both by statute in California and by court decision and neither the statutes on the subject nor the principles thereof, applied in California and generally elsewhere, are new. The attempted distinction between cases involving rescission and those involving judgments for money damages for fraud and deceit is invalid. A close analysis of the decisions relied upon by appellants will disclose that simple mistake is ground for rescission, but will not support an action for damages for fraud and deceit because, as expressed in some cases, there is no element of moral delinquency.³

The moral delinquency referred to is sometimes found in affirmative proof that certain representations were made by a defendant to a plaintiff and that the defendant at the time knew full well that what he said was false.⁴ On the other hand, the nature of deceit is such that the deceitful defendant is more than likely to have taken considerable pains to conceal the fact that he had knowledge of the falsity of his statements and representations. Last of all could he be expected to admit it in court where all the chips are down!

³*Woods-Faulkner & Co. v. Michelson* (C. C. A. 8th, 1933), 63 F. 2d 569.

⁴*Nathanson v. Murphy* (1955), 132 Cal. App. 2d 363, 282 P. 2d 174.

Where evidence of actual knowledge of the falsity of statements is found, it is usually in the form of inconsistencies, and demeanor and evidence of circumstances surrounding the facts in question which indicate to the experienced trial judge or to the jury that the defendant *must have known the truth* from which it may be properly inferred that he did know the truth.⁵ On the other hand, when it appears that the defendant makes his representations with the assurance that they are the truth, when, as a matter of fact, he does not know whether they are true or not, but supposes so (perhaps because of some unreliable information he has picked up), there is present the element of moral delinquency referred to in the decisions.⁶

The case of false representations honestly made and based upon the type of information usually relied upon by reasonable men in their dealings is to be distinguished.⁷ But where there is a duty to know the facts, which duty may be a legal duty or a duty arising out of the fact that the defendant has had every opportunity to know the true facts, the plaintiff has a legal right to rely upon the representations of the defendant even though the means of testing the truth of his statements is at hand.⁸ A breach of the duty to know the truth and speak it is a fraud and a deceit which possesses the element of moral delinquency.⁹

⁵*MacDonald v. deFremery* (1914), 168 Cal. 189, 142 Pac. 73.

⁶*Shearer v. Cooper* (1943), 21 Cal. 2d 695, 134 P. 2d 764.

⁷*Bartlett v. Suburban Estates, Inc.* (1939), 12 Cal. 2d 527, 86 P. 2d 117.

⁸*Shearer v. Cooper* (1943), 21 Cal. 2d 695, 134 P. 2d 764; *Teague v. Hall* (1916), 121 Cal. 668, 154 Pac. 851.

⁹*Gagne v. Bertran* (1954), 43 Cal. 2d 481, 275 P. 2d 15.

A more complete discussion from the standpoint of showing that cases cited by appellants are not opposed to the judgment in this case appears later in this brief. However, as background for discussion of evidence, the basic elements of fraud and deceit should be first supplied. And it should be pointed out that these basic elements are uniformly applied.

Undoubtedly not the first case on the subject, but interestingly enough far enough back to involve the practice of horse trading horses, which may be more familiar to some of the senior members of the court than to the writer, is the case of *Mayer v. Salazar*, which was decided July 8, 1890, 84 Cal. 646, 24 Pac. 597. The *Mayer* opinion clearly enunciates the principles both as established by our Civil Code and as even then long since generally recognized and established. The facts are that defendant's horse was unsound as a result of a spavin, which we understand might be likened to a cracked engine block in an automobile, but was represented to be sound. The plaintiff recognized some lameness in the horse, but the representations of the defendant were held actionable even though he swore in court that he didn't know that the horse was unsound. The opinion says in part (p. 649):

“One of the code definitions of actual fraud committed by a party to a contract, with intent to induce another party to enter into the contract, is as follows:

“‘The positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true.’ (Civ. Code, sec. 1572, subd. 2.)

“A case very similar to this was presented in *Litchfield v. Hutchinson*, 117 Mass. 195. There the plaintiff had purchased a horse from the defendant,

and at the trial he introduced evidence tending to show that he was induced to make the purchase by false representations made by the defendant as to the soundness of the horse. The defendant testified that he made no representations whatever, and that he had worked the horse almost every day for three or four weeks, and did not observe any lameness, or know that he was unsound. The appellate court, by Morton, J., said:

“ ‘This is an action of tort, in which the plaintiff alleges that he was induced to buy a horse of the defendant by representations made by him that the horse was sound, and that the horse was in fact unsound and lame, all of which the defendant well knew. To sustain such an action it is necessary for the plaintiff to prove that the defendant made false representations, which were material, with a view to induce the plaintiff to purchase, and that the plaintiff was thereby induced to purchase. But it is not always necessary to prove that the defendant knew that the facts stated by him were false. If he states, as of his own knowledge, material facts susceptible of knowledge, which are false, it is fraud which renders him liable to the party who relies and acts upon the statement as true, *and it is no defense that he believed the facts to be true. The falsity and fraud consist in representing that he knows the facts to be true, of his own knowledge, when he has not such knowledge. . . . If the defect in the horse was one which might have been known by reasonable examination, it was a matter susceptible of knowledge, and a representation by the defendant, made as of his own knowledge that such defect did not exist, would, if false, be a fraud for which he would be liable to the plaintiff, if made with a view to induce him to purchase, and if relied on by him.*’

“The law thus declared is evidently in harmony with the provisions of the code above cited, and we therefore advise that the judgment and order appealed from be affirmed.” (Emphasis added.)

The same principles were applied to automobile trading in 1925 in the case of *Gaffney v. Graf* (1925), 73 Cal. App. 622, 625, 238 Pac. 1054, when the court said:

“On this appeal the appellants frankly concede that they told respondents that the car was a 1920 model and that in truth and in fact in was a 1919 model. They also concede the well-settled proposition that when parties are *in pari delicto* neither one should recover as against the other and that this rule is not modified or altered by reason of the fact that one party sustained more damage than the other. The sole ground of appeal urged by the appellants is that the facts do not justify the finding of the trial court that the allegations of fraud and false representations made in the complaint were true. They insist that it was incumbent upon the respondents to show that the appellants knew that the statements were false or that they made the statements with reckless disregard as to the truth or falsity of them and that they made them with intent to deceive. *The plain answer to the appellants is that they had every opportunity to know the truth of the matter contained in their representations as to the model of the car, and that they knew that the year of the car was an inducing feature to the sale.*

“When a party makes a positive statement of a fact which he does not know to be true, but which he intends to influence the purchaser to a sale, and these representations are relied upon by the purchaser and the sale is thereby effected, the party is answerable to the purchaser to the same extent as

if he had actually known that his representations were false. In other words, a person may not take it upon himself to state as a fact that of which he is wholly ignorant and escape legal responsibility such as would follow if he had known the falsity of the representations.

“Here it is conceded that the representations as to the model of the car were made by the appellants and that they were false. *The proof is without dispute that the appellants either knew them to be untrue or had every opportunity to know the true facts, and thus that they were recklessly made.* The essential elements are present in the proof—that the representations were made for the purpose of inducing the respondents to make the change, and that the respondents relied upon them and were induced to make the exchange thereby to their injury.” (Emphasis added.)

In March of 1943 the law had not changed as is evidenced by the opinion of the California Supreme Court in *Shearer v. Cooper*, 21 Cal. 2d 695, 134 P. 2d 764. This time the fraud involved real property. Only a small portion of the opinion is quoted here although the entire opinion is well in point with the case at bar. At page 703 of the California Report, the court said:

“It is fair to assume that the defendant did not know the exact location of the boundaries of the acreage which he sold to the plaintiff; but under the law it is a matter about which he should have informed himself before making the representations. The trial court concluded that the defendant’s positive assertions in a manner not warranted by the information he possessed, of that which was not true even though he believed it to be true, constituted

actual fraud within the meaning of subdivision 2 of section 1572 of the Civil Code.”

Quoting further from page 704:

“ . . . In *Carpenter v. Hamilton*, the judgment for the plaintiffs was reversed because the plaintiffs chose to inspect the property before purchase and by such inspection ascertained the true factual situation, or, without any conflict in the evidence, the true condition was so apparent as to foreclose their claim of reliance. (See also to similar effect *Oppenheimer v. Clunie*, 142 Cal. 313 (75 P. 899); *Maxon-Nowlin Co. v. Norswing*, 166 Cal. 509 (137 Pac. 240); *Elko Mfg. Co. v. Brinkmeyer*, 216 Cal. 658 (15 P. 2d 751); *Gratz v. Schuler*, 25 Cal. App. 117 (142 P. 899); *Hackleman v. Lyman*, 50 Cal. App. 323 (195 P. 263).) That is not the situation disclosed by the record before us. Furthermore, it is not the law of this state that some examination made by the buyer will shield the seller from an action for damages. As was said in *Dow v. Swain*, 125 Cal. 674 (58 P. 271), ‘Every case must be judged for itself, and the circumstances which warrant or forbid relief cannot be scheduled. If the seller knows the facts (and to that should be added, or if he represents them as known to him), and the buyer is ignorant, and to the knowledge of the seller the buyer relies upon the representations,’ there is no reason why relief should not be granted, ‘although an imperfect examination was made. It may have been imperfect because of the representations.’ (See, also, *Neff v. Engler*, 205 Cal. 484 (271 P. 744).) As indicated in those cases the truth of the representations of the defendant in the present case could be checked accurately only by the employment of experts. In *Quarg v. Scher*, 136 Cal. 406 (69 P. 96), it was said that the purchaser had a right to rely

on the representations as to acreage; that the acreage of land cannot be seen by the eye at a glance, but can only be ascertained with accuracy by scientific measurements. (See, also, *Morey v. Bovee*, 218 Cal. 780 (25 P. 2d 2); *Eichelberger v. Mills Land & W. Co.*, 9 Cal. App. 628 (100 P. 117).) An instrument for measuring the area of a plane by passing a tracer around the boundary line is not the scientific instrument by which the area of land is accurately measured. Scientific measurement of land is commonly made on the ground by surveying instruments."

The last case from which we have quoted points out that "it is not the law of this state that some examination made by the buyer will shield the seller from an action of damages." If this is true it would be supposed that the buyer is not obliged to investigate the truth of the seller's representations, and this is indeed the law of this state. The opinion in *Teague v. Hall* (1916), 171 Cal. 668, 154 Pac. 851, contains a clear statement of the law at page 671 of the California Report:

"This view of the law has been repeatedly declared in the decisions in this state. In *Ruhl v. Mott*, 120 Cal. 668, 676 [53 Pac. 307], the court says, 'it is true that where one is justified in relying, and in fact does rely upon false representations, his right of action is not destroyed because means of knowledge were open to him. In such a case, no duty in law is devolved upon him to employ such means of knowledge.'"

2. **There Is Substantial Evidence in the Record That Appellants Had Actual Knowledge of the Untruth of the Statements Made by Them, That They Lacked an Honest Belief in Their Truth and That They Were Made in a Manner Not Warranted by Their Information.**

Although the evidence may well be sufficient to establish more, the code definition of actual fraud referred to in the foregoing cases is a good measuring stick to have in hand while examining the evidence. Paragraph 2 of section 1572, California Civil Code, says that actual fraud is:

“2. The positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true.”

With reference to this section the California Supreme Court said that under the law the exact location of the boundaries of real property is a matter about which the vendor should inform himself before making representations. (*Shearer v. Cooper* (1943), 21 Cal. 2d 695, 703, 134 P. 2d 764.)

Mr. Stone's testimony is so brief and direct concerning the information which he had about the boundaries of the property which he sold to the Farnells that we quote the pertinent part:

“Q. Mr. Stone, coming directly to the time you purchased the property which you later sold to the Farnells, did you at the time have a survey made of that property? A. No, sir, I didn't.

Q. Did you at any time ever know where the south boundary line of the property was? A. No, sir, I did not.

Q. Did you at any time tell the Farnells or anyone else where the boundary line was? A. I can't

remember ever discussing any boundary lines with anyone at any time.

Q. When you purchased the property where did you assume that boundary line was, the south boundary line? A. When I purchased the property I assumed that the line was somewhere between the edge of the macadam and the edge of my driveway. I wasn't placing too much importance on it. I just didn't think about it, I guess.

Q. At any time did you learn anything negatively—at any time did you learn negatively anything with regard to the location of that south boundary line? A. Not until I received the letter from Mr. Farnell telling me that he had had this survey made." [R. 131-132.]

Appellants quote a portion of Mr. Stone's testimony and we repeat the pertinent part thereof:

"The Court: I mean as far as the property was concerned. Somebody sold it to you and you assumed that all the improvements were on the land?

The Witness: That is correct.

The Court: And that is the way you sold it?

The Witness: That is correct, your Honor.

The Court: And you also treated all the improvements as if they were on your land?

The Witness: I certainly did." [R. 133.]

Mr. Stone was in New York at the time that the negotiations were carried on with the Farnells. On cross-examination Mr. Stone testified:

"Q. Your wife was really carrying on the negotiations here, wasn't she? A. That is right.

Q. So you were really not conversant with the details of the negotiations? A. Correct." [R. 135.]

It is plain to see from Mr. Stone's testimony that he did not know the location of the boundaries of his property. In fact, he evidenced a careless disregard for them. He testified that he never knew where the south boundary line of his property was and never discussed "any boundary lines with anyone at any time." He didn't even discuss it with the party from whom he purchased the property! He just *assumed* that the south boundary was somewhere between the edge of the macadam and the edge of his driveway [R. 131] and he just *assumed* that all of the improvements were on the land. [R. 133.]

Mrs. Stone's testimony sharply conflicts with the statements of Mr. Stone and casts a shadow on his veracity; but aside from that for a moment, it appears that as far as Mr. Stone was concerned he didn't even have an established belief as to the location of the south boundary of his land. Under these circumstances, he most certainly lacked an honest belief in the truth of representations which he himself made to his real estate agent [see Ex. 1, the listing signed by Mr. Stone], as well as in the truth of the representations made by Mrs. Stone, his co-owner and agent, to the Farnells. How can it be contended otherwise?

But that they were carelessly and recklessly made in a manner not warranted by the information available to him must be beyond doubt. He not only had every opportunity to know the true facts, but as owner he owed a legal duty to know them, but he not only was never informed by anyone, he was apparently not even curious about them. The representations were, therefore, carelessly and recklessly made in a manner not warranted by the information available to him. (*Gaffney v. Graf* (1925), 73 Cal. App. 622, 238 Pac. 1054.) He had in fact no information concerning them.

We find no parallel between Mr. Stone's position and the case of *Williams v. Spazier* (1933), 134 Cal. App. 340, 25 P. 2d 851. In that case the defendant had purchased certain stock after his banker had given a favorable report about one Warren, the man who sold the stock, and the company issuing it. This stock was then resold to the plaintiff. The defendant had passed on the information received from Warren and this was false. The appellate court noted that from the evidence it might have been inferred that the defendant might have reasonably believed the statements to be true or that the opposite might have been inferred. The case turned upon the principle that in such circumstances it is the duty of the court to draw the inference in favor of fair dealing.

It is incredible that Mr. Stone, who purchased real property (which sold for \$38,000.00) in an undeveloped area where there are no adjacent homes, buildings or fences [see Exs. 4 and 5 for photographs of the premises], would be so totally indifferent to the boundaries of his purchase as not to discuss the subject with anyone, including his vendor and his wife. Mrs. Stone's testimony adds to the incredibility because it is so different. She said that they had received a sketch from Mr. Daniels, the former owner, and when questioned on direct examination, referred to it as "the one he had given *us*." (Emphasis added.) [R. 138.] And again on cross-examination when questioned, she said, "Well, I think he presented this to *us* as a survey." (Emphasis added.) [R. 141.] There were other similar references.

Mrs. Stone testified on direct examination that she had no information regarding the location of the south boundary line of the property up until the time the property was sold to the Farnells other than the sketch referred to.

[R. 138.] But on cross-examination she testified to a conversation with Mr. Daniels, the former owner, in which he advised her that the south boundary line cut off two feet of the southeast corner of the carport and that that two-foot portion of the carport was on Mulholland Drive, which was City property. [R. 139.] She said that she knew that at the time that she purchased the property. She testified that the map which she got from Mr. Daniels showed that a portion of the carport was over on City property and that that was the only discussion which she had with Mr. Daniels about the encroachment of the property on City property. [R. 140.]

She said that she thought that Mr. Daniels presented the sketch to them as a survey. When asked whether or not the map showed who it was surveyed for, she at first could not recall and then remembered "one map was given to us and it said down in the left-hand corner that it was prepared for my husband, but whether that was the map or not, I am not sure. But my husband had not had it prepared and it was something that he wouldn't pay for and that was after we had been in the house a week or so." [R. 141.] She said that Mr. Daniels had ordered the map and charged it to her husband but that they never paid the bill.

At the end of the trial, Mr. Stone was asked by Mr. Cutler, who was attorney for the Farnells:

"Mr. Cutler: Do you know who prepared the sketch that Mr. Daniels ordered?"

Mr. Stone: All I can tell you is that a few days after I took possession of the house I received a bill from a strange firm and I refused to pay that bill. That is all I know.

Mr. Cutler: You received the sketch, too, did you?

Mr. Stone: No, I didn't. I received a bill.

Mr. Cutler: Did you receive a sketch at all yourself?

Mr. Stone: Did I see?

Mr. Cutler: Yes.

Mr. Stone: I remember seeing such a sketch, I believe, yes. I seem to remember that." [R. 149-150.]

This is an interesting contrast with the positive testimony which Mr. Stone originally gave, all of which has previously been alluded to, but it makes no real difference in view of the fact that whatever the sketch might have been, it made little impression upon him.

From what has been said above about Mrs. Stone's testimony, it might be inferred that there was more than one map or sketch which Mrs. Stone had seen, but this seems unlikely in view of her prior testimony that she had no other information regarding the location of the south boundary line except from the sketch received from the former owner. [R. 138.] There is little doubt as to the fact that it was the sketch with Mr. Stone's name on it which Mrs. Stone said that she gave to Mrs. Farnell because Mr. Farnell, who was questioned earlier in the trial, refers to the same document stating that it was a plat made by some surveying outfit and it said on it, "Made for George Stone." [R. 122.]

It would appear from Mrs. Stone's testimony that if there was another map or sketch it did not have Mr. Stone's name on it. The sketch which Mrs. Stone showed to Mrs. Farnell and ultimately gave to her is undoubtedly the one with Mr. Stone's name on it because it is the one to which Mr. Farnell referred and there is no testimony or evidence or inference that more than one map

or sketch was ever given to or shown to the Farnells. In fact, counsel for appellants is apparently convinced of the same fact for he states the same conclusion at page 6 of appellants' brief.

What the sketch showed is in dispute. Mrs. Stone testified that it showed the improvements and an outline of the property. [R. 137, 139, 140.] Mr. Farnell testified that it only draws the outline of the property with no improvements shown on it. [R. 123.]

Mrs. Stone testified on direct examination that she didn't believe that Mr. Farnell was with her at the time that she and Mrs. Farnell had a conversation concerning the south boundary of the property, at which time she gave the sketch to Mrs. Farnell. [R. 137.] Counsel for appellants has assumed from this testimony that there were two conversations between Mrs. Stone and the Farnells, one in which both Mr. and Mrs. Farnell were present and the other in which only Mrs. Farnell was present.

There is every indication from the cross-examination of Mrs. Stone that both Mr. and Mrs. Farnell were present at the time of the conversation about which she testified because in cross-examination she was asked about what she told the Farnells, the plural being used in such a way as to indicate Mr. and Mrs. Farnell, and she again testified to the conversation she had referred to on direct examination, in each instance referring to both of them as if both of them were present. The testimony appears in the record at pages 142 and 143.

If it were to be asumed that there had been two conversations, it would seem apparent that the conversation with Mrs. Farnell alone would have been the first conversation because at that time Mrs. Stone gave Mrs. Farnell the map which apparently was in the hands of Mr. Farnell at the time that he talked to Mrs. Stone.

The testimony is not subject to an analysis which will produce a logical certainty as to whether there was one or two conversations between the Farnells and Mrs. Stone. Mrs. Stone only testified as to one and the Farnells only testified as to one. No one asked any of these parties whether or not there were others. On the other hand, Mrs. Stone was originally uncertain as to who was present. Her cross-examination indicated that both of the Farnells were present. This seems most likely.

It is very significant that the sketch or map referred to by both Mrs. Stone and Mr. Farnell seems to be the same one. The testimony as to what it showed is directly opposite. The court very apparently did not believe Mrs. Stone's testimony as to what the sketch showed or as to what she told the Farnells about the boundary, but believed the testimony of the Farnells as indicated by Finding III. [R. 50.]

To make an interim summary of the situation, the court from the conflicting evidence determined (1) that Mrs. Stone represented to the Farnells that all of the improvements were located on the land sold to the Farnells and (2) Mrs. Stone nevertheless knew, because she was told by Mr. Daniels, that a portion of the carport was on City property. (This is an admission against interest and not a conflict in the testimony.)

Two conclusions may be drawn: (1) That the representations made by Mrs. Stone were made in a manner not warranted by her information because she had no information which indicated that all of the improvements were on the land sold to the Farnells, and (2) that Mrs. Stone had actual knowledge of the untruth of the representations made in that she knew that a portion of the carport was on City property.

Having observed that Mrs. Stone admits a partial knowledge of the true facts, it is within the discretion of the court to believe that she knew the full true facts. But there is other evidence in the record which points to such a conclusion.

Appellants argue that it is inconceivable that the Stones would have taken a large second trust deed if they knew that a large part of the improvements was not on the property. On the other hand, Mr. Stone testified that in his opinion the property was worth only \$25,000.00 at the time of the sale bearing in mind the fact that the improvements were not all located on the property. By making the sale, the Stones were relieved of an obligation represented by a note secured by a first trust deed in the sum of \$15,083.64 and obtained \$6,500.00 in cash and a 7% note secured by a trust deed on other property in the sum of \$5,250.00. The sum of these amounts is \$26,833.64, which they realized at the time of the sale without giving any consideration to the second trust deed of \$11,166.36. In view of the fact that in Mr. Stone's opinion the property was only worth \$25,000.00 [R. 133 and 134], he made a shrewd deal.

The testimony of appellants was that during the time they owned the property the main house was damaged by fire on February 8, 1953 [R. 132] and that appellants received \$15,100.00 in insurance and expended in excess of \$26,000.00 in repairing the house on the same foundation. Putting aside the thought that the court might not have believed these figures, having found reason to distrust the testimony of the parties in other respects, the disclosure of the fact that the house had been so burned and rebuilt at such cost made to the Farnells at the time of the purchase would tend to lull them into the belief

that the Stones had actual knowledge of the fact that the house was built upon their property.

The Stones may have thought that the only way that they could recoup their investment in the premises would be to rebuild the house and sell the entire property to some unsuspecting person.

It is interesting to note that in April of 1953 [R. 99] after the house was reconstructed, a gas line was run into the premises. Mr. Wilfong from the gas company went out to the premises to arrange for the installation of a meter and connecting the same to the main. He testified that the meter was to be installed ten feet north-erly of the southeasterly corner of the main house. [R. 102.] Mr. Wilfong testified that the gas company was obligated to bring the gas pipe from the main on City property to the property line of the customer and that a footage allowance was made depending upon how many gas appliances were located upon the premises and that distances over the footage allowance thus computed would be charged to the owner. [R. 101.]

It was his duty to ascertain where the property line was and to measure the distance between the property line and the meter. He did this on the Stones' property and he thinks that he discussed the matter of the boundary as disclosed by his measurements, but he could not be positive [R. 103], but it appears that he did talk to Mr. or Mrs. Stone and then testified as follows:

“Q. Do you recall what you told them in regard to the distance it would be from the main to their house? A. Yes. I have the distances right here.”
[R. 101.]

The distance was computed at 25 feet. His observations and calculations were reduced to writing and a

sketch was made showing the Stones' southern property line running at an angle across the carport and the papers were signed by Mr. or Mrs. Stone and a deposit was made. The service was then installed. [R. 102 and 103.]

By reference to Exhibit 3, the result of this information can be readily appreciated. The survey plat shows that the distance between the carport and the house is five feet and the length of the carport is 33 feet. When the distance between the meter and the corner of the house is added to the distance between the carport and the house, the sum is 15 feet, which means, according to Mr. Wilfong's calculations, that the property line ran across the carport leaving approximately 23 feet of the carport on City property.

When the installation was complete 42 feet of pipe was used, but the reason for the additional length of pipe is that the measurements were made on the top of the ground as the crow flies, while the pipe had to be installed underground in hilly terrain. Mr. Wilfong's survey, if it may be called that, was in error because it later developed that the entire carport and one-third of the main house are on City property. But this discrepancy is unimportant. What is important is the fact that in April, 1953, the Stones had before them information which was ample to disclose the urgent need for reliable information concerning their property lines.

Mr. Wilfong testified that it was his custom to discuss property lines with his customers and that he thinks that he did discuss it with the Stones, but that he couldn't be positive. [R. 103.] It would take an unusual and blasé man to refrain from disclosing the discovery that his customer's carport was built in the middle of the street. The likelihood that he did is strong.

To conclude this discussion, we refer to the code definition of actual fraud, California Civil Code, section 1572, and point out that (1) the Stones knew that the southerly boundary of the property was not located south of the carport as represented to the Farnells, and (2) the Stones positively asserted that the southerly boundary was located south of the carport in a manner not warranted by the information of Mrs. Stone or of Mr. Stone. We also refer to the California Civil Code definition of deceit (Sec. 1710) and point out that (1) the Stones suggested as a fact that all of the improvements were on the land sold and that they had no belief that this was true (Mr. Stone had no belief one way or another. Mrs. Stone knew from Mr. Daniel's statements that it was false); and that (2) the Stones had no reasonable ground to believe that their representations were true.

To use a different form of expression concerning the Stones' representations, borrowed verbatim from the decision in *Gaffney v. Graf* (1925), 73 Cal. App. 622, 625, 238 Pac. 1054:

"The proof is without dispute that the appellants either knew them to be untrue or had every opportunity to know the true facts, and thus that they were recklessly made."

3. Under the Law the Evidence Establishes Fraud and Deceit—Not Mistake.

Point VI, pages 55 and 56 of appellants' brief, is devoted to the proposition that at best the evidence shows only that the Stones were mistaken.

A further discussion of the evidence at this point is unnecessary. It has been thoroughly discussed under the last heading. The law applicable to the evidence ad-

duced in this case is well established. A landowner is presumed to know his own boundaries and is responsible for the truth of representations which he makes concerning them.

Appellants heavily rely upon a supposed stipulation to the effect that there had been a mistake as to the boundaries. The record on this subject is quoted at page 55 of appellants' brief and is found in the record at page 59. This was not a stipulation that the Stones had simply been mistaken or that there had been a mutual mistake. It was not so intended, nor was it so accepted by the trial judge. The issues of fraud and deceit as heretofore outlined were all litigated after the supposed stipulation. Number III of THE QUESTIONS INVOLVED designated by appellants is dependent upon the supposed stipulation and, therefore, needs no further consideration. Number II of appellants' SPECIFICATION OF ERRORS UPON WHICH APPELLANTS RELY likewise needs no further consideration.

Mercer v. Lewis (1870), 39 Cal. 532, holds that allegations of actual fraud are not established by proof of mistake. *Cardozo v. Bank of America* (1953), 116 Cal. App. 2d 833, 254 P. 2d 949, holds that the defendant had committed constructive fraud upon the remaindermen named in her husband's Will by not giving them notice of the probate proceedings, even though a fraudulent intent was lacking. Neither of these cases has application to the case at bar for the reasons already stated and as more fully shown by the following authorities:

The case of *Nathanson v. Murphy* (1955), 132 Cal. App. 2d 363, 282 P. 2d 174, states the rule at page 369 of the California Report:

“As a general rule, the owner of real estate, in the absence of facts showing the contrary, is pre-

sumed to know the boundaries and area of his land, and a buyer is warranted in relying upon his representations in respect to such facts.' (*Eichelberger v. Mills Land etc. Co.*, 9 Cal. App. 628, 634 [100 P. 117].) (See also *Hargrove v. Henderson*, 108 Cal. App. 667, 674 [292 P. 148]; *Younis v. Hart*, 59 Cal. App. 2d 99, 104-105 [138 P. 2d 323].)"

Other cases to the same effect are:

Mills v. Hellinger (1950), 100 Cal. App. 2d 482, 224 P. 2d 34;

Salomons v. Lumsden (1949), 95 Cal. App. 2d Supp. 924, 213 P. 2d 132;

Younis v. Hart (1943), 59 Cal. App. 2d 99, 104-105, 138 P. 2d 323;

Hargrove v. Henderson (1930), 108 Cal. App. 667, 292 Pac. 148;

Dohrman v. J. B. Roof, Inc. (1930), 108 Cal. App. 456, 293 Pac. 173;

Lombardi v. Sinanides (1925), 71 Cal. App. 272, 279, 235 Pac. 455;

Harder v. Allred (1923), 61 Cal. App. 394, 214 Pac. 1017;

Del Grande v. Castelhun (1922), 56 Cal. App. 366, 205 Pac. 18;

DeBairos v. Barlin (1920), 46 Cal. App. 665, 190 Pac. 188;

Teague v. Hall (1916), 171 Cal. 668, 670, 154 Pac. 851;

Eichelberger v. Mills Land & Water Co. (1908), 9 Cal. App. 628, 100 Pac. 117.

The fact that the purchaser is entitled to rely upon the representations of the owner without independently investigating is covered in Point 5 of Argument to which reference is respectfully made.

Appellants can take no comfort from the qualification in the above quotation which reads, "in the absence of facts showing the contrary" because they are faced with a dilemma. Either they are presumed to know in which event false representations are actionable in fraud and deceit and the element of scienter is present; or they establish as a fact that they didn't know in which event they are equally chargeable with fraud and deceit for representing as a fact that which they knew that they did not know. In the latter situation scienter is likewise present.

A third situation exists which has already been discussed. When a person makes representations which he believes to be true and he has reasonable ground to so believe (which is to say if the information is such that a reasonable man would rely upon the information), scienter is not present. Total absence of information or a happy lack of concern for the subject does not excuse a defendant nor does reliance upon conversation when the truth can only be established by scientific methods (such as a survey) with the same degree of certainty as the representations conveyed.

4. Cases Cited by Appellants in Support of the Argument That the Stones Should Be Excused Because They Had Reasonable Grounds for Believing Their Representations Are Not in Point.

The gist of this matter was referred to in the last point. A word will suffice for the facts. The trial court weighed the conflict between Mrs. Stone's testimony and the testimony of Mr. and Mrs. Farnell and came to the conclusion that Mrs. Stone told the Farnells that the southerly boundary line ran south of the carport and the guest house and that all of the improvements were on the land. [Finding III, R. 51.] The trial court did not believe that she told them that two feet of the carport was on City property. Appellants' arguments appearing in their brief at pages 32 through 37 and Point III, pages 38 through 42 entirely depend for their efficacy upon the idea that Mrs. Stone's testimony concerning her representations to Mrs. Farnell must necessarily be accepted as true. The facts as established for the purposes of appeal eliminate the argument.

Nevertheless, the cases are easily distinguishable even against the assumption made by the appellants. The cases will be taken in the order in which they are cited commencing on page 32 of appellants' brief.

Meeker v. Cross (1922), 59 Cal. App. 512, 211 Pac. 229.

In this case the defendant was the president of a company. He was, in fact, a figurehead and had no close personal knowledge of the company's affairs. All of the information which he had came from subordinates, including expert accountants. The information which he possessed was from such sources as a reasonable man would generally rely upon and, in fact, it may be noted

in passing that the Corporations Code specifically provides that action taken by directors of a corporation based upon similar information will not expose them to personal liability for negligence. (Corps. Code, Sec. 829.) He was amply justified in believing the information which he received and passed on to plaintiff who relied thereon and purchased stock. However, the case actually turned upon the fact that the only representation actually established as having been made by the defendant was that the stock was worth \$100.00 per share. The court said at page 519 of the California citation:

“Moreover, the representation was a mere statement of value, namely: ‘that the stock was worth \$100 per share.’ It stands naked and alone, and as such must be deemed merely the opinion of Cross as to the value of the property which he was offering for sale to one with whom no confidential relation existed but who was dealing with him at arm’s-length.”

And later on the same page, concluded the opinion as follows:

“We are forced to the conclusion that the mere naked statement made by defendant to plaintiff that the stock was worth \$100 per share cannot be accepted otherwise than as an opinion in the nature of trade talk, and as such plaintiff was not justified in relying thereon.”

Bartlett v. Suburban Estates, Inc. (1939), 12 Cal. 2d 527, 86 P. 2d 117.

In this case defendants sold securities without a permit. A permit was actually required although it was established that none of the defendants nor their agents

or attorneys had knowledge that a permit was required. The sale of securities carries with it an implied representation that a permit has been secured. The court stated as quoted at page 33 of appellants' brief that where the seller acted upon information sufficient to justify a reasonable man in concluding that no permit was required, then he is not liable in fraud even though he was mistaken in his belief.

The information upon which defendants acted in this case was the advice of their attorneys at law and other professional advisors. Perhaps had the Stones made their representations based upon a survey which they had caused to be made which in fact was erroneous, they would have been excused from liability for fraud and deceit because they had acted upon information which a reasonable man would accept, but such was not the case.

Nuncmacher v. Western Motor Transport Company (1927), 82 Cal. App. 233, 255 Pac. 266.

In accordance with the rule mentioned in the last case, the defendant in this case was not responsible for fraud and deceit since he had merely expressed his opinion that the business involved was a profitable business. Moreover, his opinion was based upon such information as is usually relied upon by reasonable men, to wit, a favorable report of the business including the fact that the volume of business was increasing. As the quotation in appellants' brief indicates, the court found that all of the representations made by the defendant were fully justified by the facts and circumstances as they existed and were known to defendant at the time that they were made and the appellate court observed that this finding was fully supported by the evidence. The case was further decided

upon the fact that no damage was shown to have been suffered by the plaintiff.

Brown v. Harper (1953), 116 Cal. App. 2d 48, 53, 253 P. 2d 95.

This case involves a suit by a wife against her former husband for fraud in representing that he did not own an interest in a partnership. The court found that the representations were false although unknowingly and innocently made by defendant and in addition the plaintiff did not rely upon this representation to her. Reliance upon the representation is, of course, an element of actionable fraud. The court pointed out that the elements of intent and knowledge and reliance were all absent.

Cox v. Westling (1950), 96 Cal. App. 2d 225, 229, 215 P. 2d 52.

This case turned upon the simple fact that the representation made by the defendant was simply sales talk and that the plaintiff so understood it, which is to say that it was not a material misrepresentation and that the plaintiff did not rely upon it to his damage.

McElligott v. Freeland (1934), 139 Cal. App. 143, 154, 33 P. 2d 430.

Appellants quote from this case at page 35 of their brief. The frailty of the quotation is that it simply states the contention of the appellants and a statement in general terms of what is contained in California Civil Code, Section 1572, Subsection 1, which would be the only section applicable to the case from which the quotation was taken.

The defendant maintained that he was only a stock salesman and had no knowledge of the internal affairs of the corporation whose stock was sold to the plaintiff

and that he based his information on financial statements prepared and put out by the officers of the company. The court conceded that this was the type of information which a reasonable man would rely upon, but pointed out that he made a further representation that the money derived from the sale of the stock to plaintiff would go into the treasury of the corporation and would be used for the expansion of the business. The court then said at page 155 of the California citation:

“Obviously appellant Freeland knew that the money which Powers paid him for the 2,020 shares of stock would not go into the treasury of the Hollywood Dry Corporation. Furthermore, it is to be remembered that Freeland admitted that, during the whole of the period when he was endeavoring to sell stock to Powers, he occupied an office rent free in the building of the Hollywood Dry Corporation in Los Angeles. This was a circumstance which the trial court was entitled to consider and which may well have moved the court to disbelieve his statement that he did not know that his representations respecting the success of the company and of the profits it had made and the value of its stock were false statements.”

The words just quoted are indicative of the sometimes small circumstances which will cause a court to disbelieve testimony of a party and exemplifies the fact that the court was well warranted in disbelieving the testimony of Mrs. Stone in this case.

In the sale of stock those who are possessed of information concerning the company and who make representations regarding the same are held to as high a degree of accountability as are the owners of land who are in a similar position. The falsity of their representations

may not be excused simply because they contend that they have not taken the pains to discover the truth. On the other hand, those who sell stock and who base their representations concerning the same and the company upon information published by the company and on other usual sources of information, act upon the type of information which a reasonable man ordinarily accepts.

Walker v. Dept. of Public Works (1930), 108 Cal. App. 508, 291 Pac. 907.

Agents of the Department of Public Works made certain declarations concerning the quality and productivity of land. The appellate court pointed out that all representations of fact concerning the property which were made by defendants' agents were in accordance with the facts as they existed at the time that they were made. The agents made additional representations as to the amount of agricultural products which the land would produce. The court held that such statements could not become the basis of a charge of fraud and deceit because they are highly speculative in character and represent only an opinion.

Daley v. Quick (1893), 99 Cal. 179, 33 Pac. 859.

Plaintiff rented a woodshed from defendant. A year and a half later it collapsed and plaintiff was injured. He contended that defendant fraudulently represented that the woodshed was safe in order to induce him to rent the property. The court stated that there were no reasonable grounds for supposing that the premises were not safe when rented and that, therefore, there was no actionable fraud or deceit. The case is in no wise parallel to the case at bar.

Nathanson v. Murphy (1955), 132 Cal. App. 2d 363, 367, 282 P. 2d 174.

This case has already been cited in this brief and is one of the latest cases in support of the position of appellees, the Farnells. It does not stand for the point for which it is cited at page 36 of appellants' brief. Damages were awarded for fraud and deceit in connection with the sale of real property, it being established that the representations of the defendant were false and defendant knew it at the time that they were made.

Appellants again cite *Wishnick v. Frye* (1952), 111 Cal. App. 2d 926, 245 P. 2d 532, both at pages 37 and 39, upon which they heavily rely. It is an action for fraud and deceit which was reversed for a failure to find on the question of scienter. As already mentioned, scienter does not always mean a carefully premeditated evil design to fleece an innocent party. It may sometimes be presumed from circumstances and may likewise be inferred. No useful purpose is served by attempting an academic comparison of cases involving rescission in contrast to those involving damages for fraud and deceit because the facts of this case coincide completely with the decided cases cited in this brief involving damages for fraud and deceit in the sale of real property.

5. The Evidence Fully Establishes That the Farnells Relied Upon the False Representations of the Stones.

There is no contention on the part of appellants that the false representations which were made to the Farnells were not material or that the Farnells did not rely upon these representations. The only contention made is that from the conversation which Mrs. Stone said that she had with Mrs. Farnell in which she stated that she told

Mrs. Farnell that two feet of the carport were on City property put the Farnells on such notice that they had a duty to inquire as to the boundaries of the land before they purchased and that the failure to make inquiry sufficient to determine where the boundaries were was a negligent omission. Citing *Gonsalves v. Hodgson* (1951), 38 Cal. 2d 91, 237 P. 2d 656; *Carpenter v. Hamilton* (1936), 18 Cal. App. 2d 69, 62 P. 2d 1397; and *Hobart v. Hobart Estate Co.* (1945), 26 Cal. 2d 412, 159 P. 2d 958, as well as excerpts from California Jurisprudence.

This argument is again based upon the assumption that Mrs. Stone's testimony must be accepted as true, which has already been thoroughly discussed. The court's determination of the facts is the same as if Mrs. Stone had never claimed to have made such statements. Nevertheless, as in each other instance where this claim is the foundation of a point in the brief, the issue is easily met.

The section from which a quotation from California Jurisprudence is taken is entitled, "Effect of suspicious circumstances", and following in the same section appears the following at 23 Cal. Jur. 2d 96:

"The circumstances, however, must be such that inquiry becomes a duty and failure to make it a negligent omission. Thus, the misrepresentation may itself be of such a nature as to lull the other party into a sense of security or state of inaction."

And later:

"Moreover, a party's suspicions must have been reasonably allayed by the other party's positive reassurances or representations."

And Section 40 at 23 Cal. Jur. 2d 98, points out:

“One to whom a fraudulent misrepresentation has been made is not held to constructive notice of a public record which would reveal the true facts. The purpose of the recording acts is to afford protection not to those who make fraudulent misrepresentations, but to bona fide purchasers for value.”

Gonsalves v. Hodgson, supra, involves a ship building contract. The court declined to pass upon the question of whether or not a fraudulent representation was made in view of the fact that the record failed to show any damage resulting from any such alleged fraudulent representations since the value of the vessel other than its cost was not shown.

In *Carpenter v. Hamilton, supra*, which was quoted by appellants, the court said at page 71 of the California Report:

“Plaintiffs had a right to rely upon the representations made to them concerning matters of fact which were unknown to them, without making any inquiry concerning the truth thereof, and had they done so defendant could not evade the consequences of any false and fraudulent statements he may have made by showing that means of knowledge of the truth were easily available to plaintiffs. (*Bank of Woodland v. Hiatt*, 58 Cal. 234; *Dow v. Swain*, 125 Cal. 674 [58 Pac. 271]; *Spreckels v. Gorrill*, 152 Cal. 383 [92 Pac. 1011]; *MacDonald v. deFremery*, 168 Cal. 189 [142 Pac. 73].)

“But the right to rely upon the representations, of course, does not exist where a purchaser chooses to inspect the property before purchase, and, in mak-

ing such inspection, learns the true facts, for the obvious reason that he has not been defrauded unless he has been misled, and he has not been misled where he has acted with actual or imputed knowledge of the true facts. (*Ruhl v. Mott*, 120 Cal. 668 [53 Pac. 304]; *Gratz v. Schuler*, 25 Cal. App. 117 [142 Pac. 899]; *Oppenheimer v. Clunie*, 142 Cal. 313 [75 Pac. 899].)

“Upon the question of knowledge it is held, generally, that where one undertakes to investigate the property involved or the truth of the representations concerning it and proceeds with the investigation without hindrance, it will be considered that he went far enough with it to be satisfied with what he learned.”

The difference between *Carpenter v. Hamilton* and the case at bar is obvious from the foregoing quotation in that the Farnells did not make their own investigation but relied upon the false and fraudulent statements made by the Stones and as the court says, the fact that the Farnells may have had the means of knowledge of the truth easily available to them does not permit the Stones to escape liability. This is the universally applied rule of this state as the following cases indicate:

The latest case on the subject is *Nathanson v. Murphy* (1955), 132 Cal. App. 2d 363, 282 P. 2d 174, the court saying at page 369 of the California Report:

“5. Plaintiff reasonably believed the representations to be true. Defendants, after stating ‘we admit the majority of California cases seem to be the contrary’ refer to the rule cited in 12 Ruling Case Law 372 (citing *Champion v. Woods*, 79 Cal. 17, 21 P.

534, 12 Am. St. Rep. 126) to the effect that where the means of knowledge are at hand and equally available to both parties and the subject matter is alike open to their inspection, one who fails to avail himself of these opportunities will not be heard to say that he was deceived by the others' misrepresentations. The rule has never been applied in California to representations as to land quantities."

The citation taken by appellants from *Hobart v. Hobart Estate Co.*, *supra*, involves a question of the running of the statute of limitations, the question being when a person has been put on notice of a fraud having been committed against him, the court pointing out that the time begins to run upon the discovery of suspicious circumstances. The fact that the quotation concerns the running of the statute of limitations and not the question of reliance upon fraudulent representations does not appear because the portion of the quotation which would disclose that fact was omitted.

In the case of *Younis v. Hart* (1943), 59 Cal. App. 2d 99, 138 P. 2d 323, the court held, quoting from 59 Cal. App. 2d 99, 103:

"Moreover, his statement that the easterly line of the lot was seven feet east of the easterly concrete wall of the ex-dance hall while in fact it was flush with the east wall thereof was itself a material misrepresentation and it was sufficient to justify a rescission."

And later at page 104 stated the California rule to be:

" . . . So long as plaintiffs placed their faith in the statement of defendant, their walking upon

the premises with him does not diminish the significance of his statement as a misrepresentation of the area of the lot. It was defendant's land and it was therefore his duty to know its boundaries before attempting to sell it. Plaintiffs' casual inspection did not relieve defendant of his obligation to speak with accuracy. In the purchase of land the buyer has the absolute right to rely upon the express statement of the seller concerning an existing fact the truth of which is known to the vendor and unknown to the vendee. (*Shearer v. Cooper*, 21 Cal. 2d 695, 704, 134 Pac. 2d 764; *Neff v. Engler*, 205 Cal. 484, 271 P. 744; *Dow v. Swain*, 125 Cal. 674, 58 P. 271.) In order for these plaintiffs to have learned independently the exact frontage of the lot it would have been necessary for them to make use of scientific devices. They made no pretense at a measurement. Having relied upon the word of defendant, their walking upon the premises before the purchase did not impair their right gained by such reliance. (*French v. Freeman*, 191 Cal. 579, 587, 217 Pac. 515.) The mere fact that the opportunity and means for ascertaining the exact frontage were available to plaintiffs does not defeat their right of recovery. (*Brown v. Oxtoby*, 45 Cal. App. 2d 702, 706, 114 P. 2d 622.)"

See also *Shearer v. Cooper* (1943), 21 Cal. 2d 695, 134 P. 2d 764, a quotation from which appears at Point 1 of the argument of this brief.

6. **There Is an Adequate Finding of Damages Which Fully Supports the Conclusion of Law and Judgment That the Farnells Are Entitled to \$15,000.00 Damages. This Finding Is Supported by the Evidence.**

The trial court made the following finding on damages:

“VIII.

“It is true that as a direct and proximate result of defendants’ misrepresentation as aforesaid, plaintiffs were damaged in the sum of \$15,000.00.”

Applying the out-of-pocket rule mentioned by appellants as the appropriate measure of damage in this case, the only problem for decision by the trial court was a question of value of property. The out-of-pocket rule of damages is simply that the plaintiff is entitled to the difference between the purchase price and the value of what he received. The purchase price is without dispute the sum of \$38,000.00. As soon as the value of what has been received has been determined, the rest is simple arithmetic.

A qualified appraiser testified that in his opinion the property which the Farnells received was worth \$10,600.00. [R. 79.] Mr. George Stone, the former owner, testified that in his opinion the property which the Farnells received was worth \$25,000.00. [R. 134.] Applying the testimony of the appraiser, Mr. Baehr, the amount of damages would be \$27,400.00. Applying the testimony of Mr. George Stone, the amount of damages would be \$13,000.00, but it was up to the court to fix the damages and the court has the authority to determine the value, whether it coincides with the testimony of the witnesses or not.

The law does not require more than is required by the laws of mathematics in the solution of a simple problem in subtraction which has already been referred to. There are three parts to the problem, the minuend, the subtrahend and the difference. If the minuend and the subtrahend are known, the difference can be computed. By the same token, if the minuend and the difference are known, the subtrahend is easily supplied. The law is not more exacting than the mathematical problem itself. When the minuend is known and the findings supply the difference, they are adequate.

We quote from *Employees' Participating Assn. v. Pine* (1949), 91 Cal. App. 2d 299, 302-303, 204 P. 2d 965:

"There was evidence, oral and documentary, showing the selling price of the property to be \$21,750, and there was expert testimony that the value of the property at the time of the breach was not 'over \$17,000.' That evidence would have been legally sufficient to have supported a finding that the plaintiff was damaged in the sum of \$4,750 (the difference between the selling price and the market value at the time of the breach). As shown above, the court awarded damages in the sum of \$2,500, which was less than the amount of said difference in values. The trial court was not required to find the value of the property to be the full value stated by a witness. It was stated in the case of *Roloff v. Hundebly*, 105 Cal. App. 645, at pages 652-653 [288 Pac. 702]: 'Questions of value are almost always matters of opinion, and evidence thereon usually goes no further than to give the court more or less general ideas on the subject. From the evidence thus received a trial court must draw its own conclusions of value by a process of balancing and reconciling, if possible, the varying opinions. . . . [T]he trial court,

in an effort to attain an even justice, often exercises a wide discretion in awarding damages.' Apparently the court herein found the market value of the property to be \$19,250 at the time of the breach (which is \$2,500 less than the selling price of \$21,750).

"A trial court need not set forth computations showing by what method it determined the amount of damages to be awarded. (*Roloff v. Hundebly, supra*, p. 652.) The case of *Klegman v. Moyer*, 91 Cal. App. 333 [266 Pac. 1009], was an action to recover damages for an alleged breach of contract to exchange real property. The trial court awarded plaintiff damages in the sum of \$5,000 but did not set forth its process of computation. On appeal the court stated therein, at page 346: 'We are entitled to draw necessary inferences from the findings in order to support a judgment. . . .

"It has been held that courts may find damages in a lump sum, and that any uncertainty in the findings is to be construed so as to support the judgment rather than to defeat it." The trial court herein had before it testimony as to the value of the property at the time of the breach, testimony regarding fluctuation in market values at the time of and immediately after the breach, evidence of the type, construction and age of the building, and conditions generally in that neighborhood. The finding as to the amount of damages is supported by the evidence.

"The judgment is affirmed."

See also *Ginsburg v. Royal Inv. Co.* (1950), 179 F. 2d 152, to the same effect.

The case of *Bagdasarian v. Gragnon* (1948), 31 Cal. 2d 744, 192 P. 2d 935, referred to by appellants is not

opposed to the foregoing principles. In the *Bagdasarian* case it was obvious to the court that an element affecting the amount of the award of damages had been omitted from the court's consideration. The evidence on the subject was conflicting; so the appellate court returned the case to the trial court for determination of this single issue, and otherwise affirmed the judgment.

In the case at bar there is nothing to discredit the court's determination of the issue of damages. The portion of Finding IV [R. 53] (erroneously referred to at page 43 of appellants' brief as VI) which is attacked as a negative pregnant is not an attempt to establish the subtrahend of the subtraction problem; so this issue is a straw man.

It is a straw man for the reason just stated and for several other reasons. It is not necessary to turn to analogy to find the California law on negative pregnant appearing in findings. The cases cited by appellants, commencing at the bottom of page 43 through 46,¹⁰ concern negative pregnant appearing in answers and are therefore not in point. The California law concerning the matter of negative pregnant in findings is well expressed

¹⁰*Janeway & Carpender v. Long Beach Paper & Paint Co.* (1922), 190 Cal. 150, 21 Pac. 6;

Beetson v. Hollywood Athletic Club (1930), 109 Cal. App. 715, 293 Pac. 821;

Arner v. Dorton (1942), 50 Cal. App. 2d 413, 123 P. 2d 94;

Preston v. Central Cal. etc. Irr. Dist. (1909), 11 Cal. App. 190, 104 Pac. 462;

Schroeder v. Mauzy (1911), 16 Cal. App. 443, 118 Pac. 459;

Kennedy v. Rosecrans Gardens, Inc. (1952), 114 Cal. App. 2d 87, 249 P. 2d 593.

in the late case of *Heifetz v. Bell* (1950), 101 Cal. App. 2d 275, 225 P. 2d 231, at page 277 of the California Report:

“It is fervently contended that because the finding of nonreliance, and other findings contain negative pregnant they imply the truth of allegations they purport to controvert. While such findings are not to be approved as to their form a reversal on that account will not be ordered. The doctrine still obtains that findings are to be accorded a liberal construction with a view of supporting rather than defeating a judgment, and where it is plain that the intent was to find the material facts against appellant, the trial court’s decision will not be set aside. (*Johndrow v. Thomas*, 31 Cal. 2d 202, 208 [187 P. 2d 681]; *McAuliffe v. McAuliffe*, 53 Cal. App. 352, 355 [199 Pac. 1071]; *Ballagh v. Williams*, 50 Cal. App. 2d 10, 14 [122 P. 2d 343].) It is clear from the findings as a whole and a review of the entire record that it was intended to find adversely on each of appellants’ allegations relative to any material fraudulent representations. If there be error present, it is not such as to have prejudiced appellants, or resulted in a miscarriage of justice. Section 4½, article VI of the Constitution was enacted for the purpose of preventing reversals in just such situations as are presented here. Where the record indicates that a fair trial was had and the decision reasonably indicates the true findings and conclusions of the court and that the issues have been clearly cast and fairly determined, the judgment will not be upset.

“Judgment affirmed.”

The following cases are to the same effect.

Johndrow v. Thomas (1947), 21 Cal. 2d 202,
209, 187 P. 2d 681:

“ . . . It has been settled by a legion of cases that ‘Findings should be accorded a liberal construction, with a view of supporting, rather than defeating, the judgment’.”

Ballagh v. Williams (1942), 50 Cal. App. 2d 10,
122 P. 2d 343;

Arnheim v. Firemen's Ins. Co. (1924), 67 Cal.
App. 468, 227 Pac. 676;

McAuliffe v. McAuliffe (1921), 53 Cal. App. 352,
199 Pac. 1071.

Appellants' argument is a straw man for yet another reason. The procedure for the trial of cases in United States District Courts is governed by the Federal Rules of Civil Procedure. The necessity for findings and their scope is a procedural matter governed by Rule 52(a). The rules applied to civil actions in the courts of California dove-tail with the rules applied in civil actions in the courts of the United States.

The Federal viewpoint is well expressed in the 1952 Ninth Circuit case of *Carr v. Yokohama Specie Bank, Limited, of San Francisco*, 200 F. 2d 251.

The extent to which the procedural rules of California and of the United States coincide is exemplified by the fact that California courts are controlled by Article VI, Section 4½, of the State's Constitution, which reads in part:

“No judgment shall be set aside, . . . in any case, . . . for any error as to any matter of pleading, or for any matter of procedure, unless,

after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.”

The courts of the United States are controlled by F. R. C. P. 61 and by 28 U. S. C. A. 2111, which reads as follows:

“Sec 2111. Harmless Error.

“On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.”

The results reached by appellate courts of both systems are correspondingly similar.

Before leaving this point for the next, attention should be given to appellants' attempt to apply the principles of the *Bagdasarian* case to the one at bar. Their point is based upon the erroneous contention that the guest house furniture in the Stone-Farnell transaction was not taken into account by the court in awarding damages, and that in this respect the case is on all fours with the *Bagdasarian* case.

There are important differences. It was established in the *Bagdasarian* case that the farm equipment was not taken into account. The same is not true of the case at bar. The second important difference, from the standpoint of discussion, is interwoven with the first, to wit: Appellants erroneously assume that the value of the furniture does not appear in the record. However, the value was established by Mr. Baehr as being \$2,500.00 [R. 79.]

Appellants' argument assumes that the record discloses that the testimony of value of the property which the Farnells actually received was without regard for the guest house furniture. The very contrary is true. The fact that the appraiser, Mr. Baehr, took the furniture into account in making his calculations and arriving at his opinion is indicated by his testimony where in the same breath he gave his opinion and referred to the furniture:

"The Court: Then what was the property worth in the condition that it finally developed it was in? That is what we are interested in.

Mr. Pollack: That is right.

Q. (By Mr. Cutler): Would you give us the answer to that question which the court has propounded, the value as it was actually existing? A. In my opinion the market value as the property actually existed is \$10,600.

My market value of the property as it appeared to exist was not \$38,000. There was personal property involved which cut the value down.

Q. However, in adding on the \$2,500 value of personal property you did arrive at essentially the same figure, did you not? A. That is correct.

Q. \$37,000? A. Correct.

Q. Then as it actually existed you have given a market value at that time of \$10,600? A. That is correct.

Mr. Cutler: Cross-examine." [R. 79.]

Appellants would certainly not contend that Mr. Stone's testimony did not consider the furniture which was part of his bargain when he said that in his opinion the value which the Farnells received was \$25,000. [R. 134.] At least it must be conceded that nothing appears in the

record to indicate that these two witnesses did not have the value of the furniture in mind.

The law supplies the answer as to whether or not the trial judge considered the fact that the furniture was included in the bargain, in the absence of a clear showing that he did not.

“Rule 52 of the Federal Rules of Civil Procedure for District Courts, 28 U. S. C. A. following section 723c, provides among other things, that, ‘Findings of Fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.’ The findings of the court are presumptively correct and will not be set aside unless resulting from an erroneous view of the law or are clearly against the weight of the substantial evidence, and in considering this question we view the evidence in the light most favorable to the prevailing party, the burden being on the unsuccessful party to show that the evidence compelled a finding in his favor.” (*Anderson v. Federal Cartridge Corporation* (1946, 8th Cir.), 156 F. 2d 681, 684.)

7. The Findings of Fact and Conclusions of Law Are Sufficient to Support the Judgment.

A. THE SUPREME COURT OF THE STATE OF CALIFORNIA HELD IN 1954 THAT SCIENTER IS NOT AN ELEMENT OF EVERY CAUSE OF ACTION FOR DECEIT.

Appellees, the Farnells, desire to fully and fairly and directly meet the issue posed by the appellants that findings are required upon the issue of scienter and that none appear in the findings of the court. Appellants have pointed out the several respects in which this contention is made and it would, we think, serve no useful

purpose to detail these issues because the application of appellants' contentions to the points which they have made on appeal will be easily observed by the court.

It is, of course, well established that findings of fact need be only findings of ultimate fact and that such findings are only required as to the elements necessary to sustain the judgment. Cases will hereafter be cited which support this proposition.

It should be noted that in discussing appellants' contentions that a finding of scienter is requisite, appellants have cited no case later than *Wishnick v. Frye* (1952), 111 Cal. App. 2d 926, 245 P. 2d 532. Appellants also cite the following cases:

Hoffman v. Kirby (1902), 136 Cal. 26, 68 Pac. 321;

Gonsalves v. Hodgson (1951), 38 Cal. 2d 91, 237 P. 2d 656.

In 1954 the Supreme Court of the State of California in the case of *Gagne v. Bertran*, 43 Cal. 2d 481, 275 P. 2d 15, said in a footnote at page 487, which refers to Civil Code Section 1710, as follows:

"Since the Legislature in this section of the Civil Code has made the cause of action for negligent misrepresentation a form of deceit, statements in a number of cases, contrary to this section and the cases cited in the text, that scienter is an essential element of every cause of action for deceit are erroneous and are therefore disapproved. (See, for example, *Podlasky v. Price*, 87 Cal. App. 2d 151, 161 [196 P. 2d 608]; *Swasey v. de L'Etanche*, 17 Cal. App. 2d 713, 716-717 [62 P. 2d 753]; *Palladine v. Imperial Valley Farm Lands Assn.*, 65 Cal. App.

727, 742 [225 P. 291]; *Griswold v. Morrison*, 53 Cal. App. 93, 101 [200 P. 62]; *Smeland v. Renwick*, 50 Cal. App. 565, 569 [196 P. 283].)”

In the same case at page 488 in a footnote and with reference to Civil Code Section 1709, the court says:

“Under this section of the Civil Code the intent required to prove a cause of action for deceit is an intent to induce action. An ‘intent to deceive’ is not an essential element of the cause of action, and statements in a number of cases, contrary to this section and the cases cited in the text, that such an intent is an essential element of deceit are erroneous and are therefore disapproved. (See, for example, *Cardozo v. Bank of America*, 116 Cal. App. 2d 833, 837 [254 P. 2d 949]; *Hayter v. Fulmor*, 92 Cal. App. 2d 392, 398 [206 P. 2d 1101]; *Boas v. Bank of America*, 51 Cal. App. 2d 592, 598 [125 P. 2d 620]; *Griswold v. Morrison*, *supra*, 53 Cal. App. 93, 97; *Smeland v. Renwick*, *supra*, 50 Cal. App. 565, 569; *Hodgkins v. Dunham*, 10 Cal. App. 690, 698 [103 P. 351].)”

The text referred to includes all the cases cited by appellants and many others. *It must be taken to be the law of California that scienter is not an essential element of every cause of action for deceit and since it is not an essential element, it need not be pleaded and by the same token, it need not be found by the trial court in its findings of fact, and since the essential elements of a cause of action is a matter of substantive law and not a matter of procedure, the law of the State of California controls.*

While the foregoing should dispose of this argument by appellants, we take the liberty to point out several other equally applicable arguments based on the procedural

aspect of the same problem which is governed by the law of the forum to wit, the laws of the United States, the Federal Rules of Civil Procedure.

B. ADMISSIONS CONTAINED IN THE ANSWER MAKE UNNECESSARY SOME OF THE FINDINGS APPELLANTS THINK ARE REQUIRED.

Appellants relied heavily upon the proposition that an alleged negative pregnant existing in the findings sufficiently cast doubt upon the specific finding of damage to constitute reversible error. Authority has already been cited in this brief to the contrary and as said in *Ballagh v. Williams* (1942), 50 Cal. App. 2d 10, 14, 122 P. 2d 343:

“In any event the logical defect of a negative pregnant does not apply to findings. (*McAuliffe v. McAuliffe*, 53 Cal. App. 352 [199 Pac. 1071].)”

The rule applicable to negative pregnant found in the answer is that a denial containing a negative pregnant is an evasive answer, and, therefore, an admission which does not raise an issue. Findings are only required upon the contested issues. (*Petersen v. Murphy* (1943), 59 Cal. App. 2d 528, 139 P. 2d 49.)

Appellants' answer contains negative pregnant which presently will be pointed out. These negative pregnant constitute admissions concerning which findings are not required.

Appellants admitted (not by way of negative pregnant, but by failure to deny) all of the allegations of paragraph III of the Second Cause of Action of the complaint. [R. 9.] This paragraph is a statement of the representations which the Stones made to the Farnells. One of

these representations was that the property being sold by the Stones was well worth the price asked by the Stones, namely \$38,000.00. Paragraph XI of the same cause of action of the complaint alleges:

“That defendants *falsely and fraudulently* represented to plaintiffs that their residential property being sold by defendants to plaintiffs was well worth the purchase price of \$38,000.00; that in truth and in fact the said residential property was not worth more than \$18,000.00.” [R. 14.] (Emphasis added.)

The representation had already been admitted as above explained so that the quoted allegation added the elements of “*falsely and fraudulently*,” restated the \$38,000.00 figure and added the \$18,000.00 figure. This allegation was denied “generally and specifically” by reference to paragraph number. This is a denial in the conjunctive which is an admission as explained in *Fitch v. Bunch* (1866), 30 Cal. 208.

It is also an admission of both monetary amounts as fully explained by authorities cited by appellants at pages 43 to 46, inclusive, of their opening brief. See *Jancway & Carpender v. Long Beach Paper & Paint Co.* (1922), 190 Cal. 150, 21 Pac. 6, from which we quote as did appellants in their brief:

The denial of nonpayment of \$6,190.88 was in the following form:

“Defendant ‘. . . denies that the said sum of \$6,190.88 has not been paid.’ ”

The Court said:

“This is an admission that the sum of \$6,190.87 is unpaid. . . .”

From the foregoing it is clear enough that appellants have admitted their fraudulent representations as alleged in the complaint and that the property was not worth more than \$18,000.00 which admission should result in an award of damage equal to the difference of \$20,000.00.

On precisely the same basis, paragraphs II and III of the Third Cause of action in the complaint [R. 15] and paragraph XI of the Second Cause of Action, incorporated by paragraph I of the Third Cause of Action (which is the paragraph just discussed) were admitted. These admissions are as above stated and that the property would have been worth \$38,000.00 if it had been as represented and that it was actually only worth \$18,000.00, and, interestingly enough, that as a result of appellants' fraud that appellees were damaged in the sum of \$20,000.00.

Appellees have not complained by appeal of the fact that the court awarded them \$5,000.00 less than appellants concede is due.

At another point in this brief, cases were cited to the effect that representations simply as to value are usually considered to be matters of opinion. However, when such representations are coupled with representations as to other facts, they cease to be representations as to value only and are actionable. In the instant case, the representation as to value was coupled with representations as to what improvements were on the land in such a way as to support the representation as to value. In this way the instant case is to be distinguished from those cited elsewhere in this brief on value. See *Mecker v. Cross* (1922), 59 Cal. App. 512, 519, 211 Pac. 229:

“ . . . The general rule is that a bare and naked statement as to the value of property, in the absence of confidential relations between the parties, is deemed the opinion of the party making the representation, and upon which the purchaser thereof has no right to rely, but acts upon his own judgment. Apparent exceptions found are due to statements of extrinsic facts affecting the value and with which the false representation is made or upon which it is based. (*Winkler v. Jerrue*, 20 Cal. App. 555 [129 Pac. 804]; *Ellis v. Andrews*, 56 N. Y. 83 [15 Am. Rep. 379]; *Schumaker v. Mather*, 133 N. Y. 590 [30 N. E. 755]; *Union Nat. Bank v. Hunt*, 7 Mo. App. 42; S. C., 76 Mo. 439.)”

Of course the law applicable to matters of procedure in the case at bar is the Federal law and not the State law. Rule 8(d) provides that the amount of damage is deemed denied so that the negative pregnant above referred to in connection with the allegation of damage in the amount alleged in the complaint does not constitute an admission under Federal rules. Rule 8(b) provides for the form of denials and requires that denials shall fairly meet the substance of the averments denied. This, the denials in the instant case, fail to do. It is the Federal rule as well as the State rule that an allegation not denied in the answer must be taken as admitted and as was held in *Fontes v. Parker* (C. C. A. 9, 1946), 156 F. 2d 956 at 957:

“Neither proof nor finding is requisite in respect of uncontested issues.”

Our research has disclosed but one case with reference to denials of allegations as pleaded, the case of

National Millwork Corporation v. Preferred Mut. F. Ins. Co. (D. C., N. Y., 1939), 28 Fed. Supp. 952, wherein the District Judge said at page 953:

“While it is true that in paragraphs Second and Fifth of the answer, the defendants do not substantially deny the allegations contained in certain paragraphs of the complaint, they do deny the allegations as pleaded, and defendants are not compelled to adopt plaintiff’s manner of pleading, by admitting the same.

“It does not seem to me that any confusion results, but, on the contrary, the answer clearly shows what facts are admitted, but does not admit them in the manner alleged by the plaintiff.”

It is not clear whether the court’s reference was to the same situation as presented in this case and it should be noted that there is apparently no ruling upon this question by any appellate court of the United States.

Appellate courts are enjoined by statute (28 U. S. C. A. 2111) to sustain the judgment unless the error is such as to affect the substantial rights of the parties. It is clear from the judgment in all respects that the court must have found the allegations which were evasively denied to be true. Since the denials are evasive and do not fairly meet the substance of the averments denied and since findings of fact are not required upon matters which are admitted, *it would be equally technical to hold that findings are required on these matters as to hold that the averments are admitted by a failure of the answer to fairly meet the substance of the averments denied.*

C. SINCE AS A MATTER OF LAW THE STONES ARE PRESUMED TO KNOW THE BOUNDARIES OF THEIR LAND AND IT IS ADMITTED THAT THEY DID NOT, THERE IS NO ISSUE WHICH WOULD REQUIRE A FINDING OF KNOWLEDGE OF THE FALSITY OF THEIR REPRESENTATIONS.

An owner of land is presumed to know the boundaries of his land and a prospective purchaser is entitled to rely upon the representations of the landowner. (*Shearer v. Cooper* (1943), 21 Cal. 2d 695, 703, 134 P. 2d 764; *Teague v. Hall* (1916), 171 Cal. 668, 154 Pac. 605; *Eichelberger v. Mills Land etc. Co.* (1908), 9 Cal. App. 628, 100 Pac. 709.)

It is an established fact in this case that the Stones misrepresented the boundaries and that the Farnells relied upon the representations to their injury. Since the Stones were presumed to know their boundaries, a finding as to whether they did or not is not required.

D. UNDER THE FEDERAL RULES OF CIVIL PROCEDURE FAILURE TO MAKE FINDINGS IS NOT JURISDICTIONAL AND IS NOT NECESSARILY FATAL ERROR.

It was held in a recent case in the Ninth Circuit that failure to make findings of fact is not jurisdictional where the court refused to make findings and incorporated both findings and judgment in its opinion which was duly entered as a judgment.

Steccone v. Morse-Starrett Products Co. (C. C. A. 9, 1951), 191 F. 2d 197.

Even where findings of fact which were made by the trial court were not sufficient to adequately cover the contested issues, Federal courts have nevertheless con-

sidered the case on appeal and affirmed the judgment after reviewing the evidence and concluding that based upon the facts which were mentioned in the court's opinion and upon the evidence, the decision of the District Court was correct.

Life Savers Corp. v. Curtiss Candy Co. (C. C. A. 7, 1950), 182 F. 2d 4.

As in the State courts, the findings may be inferred from other findings or from the fact that the issue was resolved against one of the parties.

Burkhard v. Burkhard (C. C. A. 10, 1948), 175 F. 2d 593.

Appellate courts have turned to the court's memorandum opinion to aid in explaining the court's decision and findings.

Glens Falls Ind. Co. v. United States (C. C. A. 9, 1956), 229 F. 2d 370;

Skelly Oil Co. v. Holloway (C. C. A. 8, 1948), 171 F. 2d 690.

And it was held in *Goodacre v. Panagopoulos, et al.* (App. D. C., 1940), 110 F. 2d 716, 718, that while the court had failed to comply with Rule 52(a) to find the facts specially, it does not follow that the court must reverse the judgment because the rule is intended to aid appellate courts by affording them a clear understanding of the basis of the decision below. When from the record this clear understanding is afforded, the judgment may stand, although the rule is violated.

8. For Lack of an Indispensable Party, the Court Is Without Jurisdiction to Grant Affirmative Relief on Appellants' Counterclaim.

Appellants are in error in asserting that if the claim of the plaintiffs is reversed, judgment should be rendered in favor of appellants on their counterclaim. (App. Br., Point VIII, pp. 64-65.) Appellants voluntarily dismissed Bank of America as a party defendant to their counterclaim. [R. 40.] Bank of America was trustee of the trust deed which appellants sought to foreclose in said counterclaim; and the trustee of a deed of trust is an indispensable party in foreclosure on a deed of trust. See *Thayer v. Life Assoc. of America* (1885), 112 U. S. 717, 5 S. Ct. 355, 28 L. Ed. 864; *Peper v. Fordyce* (1886), 118 U. S. 468, 7 S. Ct. 287, 30 L. Ed. 435; *Wilson v. Oswego Township* (1894), 151 U. S. 56, 14 S. Ct. 259, 38 L. Ed. 70; *Massachusetts and S. Construction Co. v. Township of Cane Creek* (1894), 155 U. S. 283, 15 S. Ct. 118, 39 L. Ed. 153.

Where indispensable parties are not and cannot be joined, the court should not proceed; it cannot enter an equitable judgment in the cause. *Cameron v. Roberts* (1818), 3 Wheaton 591, 4 L. Ed. 467; *Brown v. Christman* (App. D. C. 1942), 126 F. 2d 625.

If an indispensable party is not before the court, the action must be dismissed. *Neher v. Harwood* (C. C. A. 9, 1942), 128 F. 2d 846.

Failure to join the Bank of America as a party does not, however, preclude the court from recognizing defendants' offset for the amount of the second trust deed, since under rule 13 of the Federal Rules of Civil Procedure, and Section 440 of the California Code of Civil

Procedure, the cross-demands of the plaintiffs and defendants “shall be deemed compensated so far as they equal each other.”

Conclusion.

The foundation stone of the appeal is the assumption on the part of appellants that the testimony of Mrs. Stone as to the representations which she made to the Farnells must be accepted as true, even though it is completely contradicted by the testimony of Mr. and Mrs. Farnell and other evidence, including conflicts in the testimony of both Mr. and Mrs. Stone and the surrounding circumstances. The trial court resolved the conflict after weighing the evidence and having the opportunity to observe the conduct and demeanor of the witnesses. In view of the fact that it is the universal rule of appellate courts that they will not reweigh the evidence, and as it has been pointed out in argument, the findings of fact are adequate to support an action for fraud and deceit, there is no basis for the appeal.

Respectfully submitted,

ALBERT LEE STEPHENS, JR.,
Attorney for Appellees.

No. 15024

In the
United States Court of Appeals
For the Ninth Circuit

GEORGE WESLEY STONE and HIL-
DEGARDE W. STONE,

Appellants,

vs.

JACK W. S. FARNELL and ELISA-
BETH PATTEE FARNELL,

Appellees.

Petition for Rehearing

FILED

JAN - 4 1957

PAUL P. O'BRIEN, CLERK

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Appellees.

No. 15024

Petition for Rehearing

*To the Honorable United States Court of Appeals for
the Ninth Circuit, and to the Honorable Stanley N.
Barnes and Frederick Hamley, Circuit Judges, and
John Ross, District Judge:*

Appellants, GEORGE WESLEY STONE and
HILDEGARDE W. STONE, herein referred to as
vendors, respectfully petition for a rehearing in the
within matter upon the following grounds:

I.

THERE IS NO FINDING OF FACT IN THE MEMORANDUM OPINION OF THE HONORABLE BEN HARRISON, BEFORE WHOM THIS CAUSE WAS TRIED IN THE DISTRICT COURT, THAT VENDORS WERE NEGLIGENT IN MAKING THE REPRESENTATIONS CONCERNING THE BOUNDARIES OF THE PROPERTY AND THE LOCATION OF THE IMPROVEMENTS THEREON.

This Honorable Court, at page 5 of its decision, concedes that a finding and evidence of negligence is essential. At page 6 it correctly states that there is no such Finding of Fact in the record. We do not agree that the omission is supplied by the Memorandum Opinion of the court below. We are unable to discover anything in the Memorandum Opinion which amounts to a finding that the vendors were negligent in making the representations complained of. The most that can be said in this regard is that Judge Harrison stated as a Conclusion of Law that the vendors committed actual and constructive fraud. This is not a Finding of Fact and is not in compliance with Rule 52(a).

II.

THE COURT HAS NOT CONSIDERED POINT III OF APPELLANTS' BRIEF THAT "ALTHOUGH HONEST BELIEF OR LACK OF KNOWLEDGE IS NOT A DEFENSE IN AN ACTION FOR RE-SCISSION BASED ON FRAUD, A DIFFERENT RULE APPLIES IN AN ACTION FOR DAMAGES. AUTHORITIES INVOLVING ACTIONS IN RE-SCISSION ARE THEREFORE NOT IN POINT."

This subject is discussed commencing at page 38 of appellants' brief. As there stated, this is an action at law to recover damages for fraud and deceit. It is not an action for rescission based on fraud. The vendees, of course, were entitled to elect to sue at law for damages for deceit rather than in equity for rescission. However, in an action for deceit, as distinguished from rescission, the vendors' honest belief or lack of knowledge is a complete defense. This is the rule in the Federal Courts as well as in California. See *Woods-Faulkner & Co. v. Michelson*, 63 Fed. (2) 569, [C.C.A. 8th Cir. Feb. 17, 1933], and *Kimber v. Young*, 137 Fed. 744, 747, cited at pages 40 and 41 of appellants' brief. As stated in *Kimber v. Young*:

"While the elements essential to sustain an action at law for fraud and deceit are sufficient to sustain a suit in equity for rescission of the contract of sale, the converse of this statement is not true. Even an innocent misrepresentation is sufficient to sustain an action to rescind, while, *to sustain an action for damages for fraud and deceit, the representation must have been actually fraudulent, involving moral delinquency.*" (Emphasis added.)

The Court has given no consideration to the difference in the degree and kind of proof required in an action at law to recover damages for fraud and deceit, as in the instant case, as distinguished from an action in equity for rescission. As stated in *Kimber v. Young*, “to sustain an action for damages for fraud and deceit, the representation must have been actually fraudulent, involving moral delinquency.” No such facts are disclosed by the record before this court. On the contrary, the undisputed evidence is that the vendors honestly believed their representations to be true and had no knowledge to the contrary. See point II of appellants’ brief commencing at page 24.

Nor is there a Finding of Fact that the vendors lacked an honest belief in the truth of their representations. See point I of appellants’ brief commencing at page 21. Nor can such a finding be found in the Memorandum Opinion of the District Court. In fact, Judge Harrison, in his remarks at the close of the trial (transcript p. 150 et seq.) did not question the honesty or sincerity of the vendors, and attributed the entire controversy to “an unfortunate mistake”. (transcript p. 150). As stated at page 5 of this court’s decision, the absence of a finding on the reasonableness of the vendors’ belief is reversible error. *Williams v. Spazier*, 134 C.A. 340, 25 P. 2d 851, cited in appellants’ brief, p. 26 et seq.

III.

THE COURT HAS NOT CONSIDERED POINT VI OF APPELLANTS' BRIEF THAT "THE EVIDENCE AT BEST SHOWS THAT APPELLANTS WERE MISTAKEN AS TO THE BOUNDARIES OF THE PROPERTY AND THE LOCATION OF THE IMPROVEMENTS. AN ALLEGATION OF FRAUD IS NOT SUSTAINED BY PROOF OF MISTAKE."

This point is treated at pages 55 and 56 of appellants' brief. As there stated, it was stipulated in the trial court that there had been a mistake as to the boundaries, and as stated above, Judge Harrison himself attributed the entire controversy to "an unfortunate mistake". As was held in *Mercier v. Lewis*, 39 Cal. 532, referred to at page 56 of appellants' brief, an allegation of actual fraud is not sustained by proof of mistake.

It is respectfully submitted that a rehearing should be granted to give further consideration to the fact that even though this court may consider the Memorandum Opinion of the District Court, that even so the said opinion contains no finding as to the reasonableness of the vendors' belief, or of negligence in making the representations, which this Honorable Court has stated is essential; to consider the authorities cited in point III of appellants' brief holding that although honest belief or lack of knowledge is not a defense in an action for rescission, it is a complete defense in an action at law to recover damages for fraud and deceit:

and further, to consider point VI of appellants' brief that allegations of fraud are not sustained by proof of mistake.

Respectfully submitted,

LEO SHAPIRO

Attorney for Appellants

I hereby certify that the foregoing Petition for Rehearing is, in my judgment, well founded, and that it is not interposed for delay.

LEO SHAPIRO

Attorney for Appellants





